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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]
170

ROLF J. KOLDEN,

Petitioner,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 4,
Beltrami County, Minnesota,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ROLF J. KOLDEN,

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SELECTIVE SERVICE LOCAL BOARD NO. 4,
Beltrami County, Minnesota,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on January 28, 1969.

Opinions Below

The opinion of the Court of Appeals is unreported. It is printed in the appendix, *infra*, pp. 1a-10a. The opinion of the District Court is unreported. It is printed in the Appendix, *infra*, pp. 18a-22a. The order of Judge Blackmun of the Court of Appeals, granting injunction pending appeal, is unreported. It is printed in the Appendix, *infra*, pp. 11a-17a.

Jurisdiction

The judgment of the Court of Appeals was entered on January 28, 1969. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

Questions Presented

Petitioner, a third-year graduate student, as of October 1, 1967, was deferred from training and service in the armed forces under Section 6(h)(2) of the Military Selective Service Act of 1967 and 32 CFR § 1622.26(b). Upon returning his Selective Service Registration Certificate and Notice of Classification to the government as a statement of protest against the war in Vietnam, petitioner was declared delinquent under the Selective Service Regulations, stripped of his deferment, reclassified I-A, and ordered to report for induction. Under these circumstances:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U. S. C. § 460(b)(3)] preclude judicial review of petitioner's punitive reclassification and order to report for induction?

2. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Registration Certificate and Notice of Classification in his personal possession, violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations,

3. Do Selective Service Regulations 1617.1 and 1623.5, as construed and applied in this case, and Selective Service Regulation 1642.4 on its face, violate the First Amendment.

Statutes and Regulations Involved

Sec. 10(b)(3), Military Selective Service Act of 1967; 50 App. U.S.C. Sec. 560(b)(3) is set out in the Appendix, *infra*, p. 23a.

Sec. 6(h)(2), Military Selective Service Act of 1967; 50 App. U.S.C. Sec. 546(h)(2), is set out in the Appendix, *infra*, p. 23a.

Selective Service Regulation 1622.26; 32 C.F.R. § 1622.26, is set out in the Appendix, *infra*, p. 25a.

Selective Service Regulation 1642.4; 32 C.F.R. § 1642.4, is set out in the Appendix, *infra*, p. 26a.

Selective Service Regulation 1617.1; 32 C.F.R. § 1617.1, is set out in the Appendix, *infra*, p. 26a.

Selective Service Regulation 1623.5; 32 C.F.R. § 1623.5, is set out in the Appendix, *infra*, p. 27a.

Statement of the Case

Petitioner, on October 16, 1967, and at all pertinent times thereafter was a third-year graduate student at Harvard University (R. 2)[1] and was classified II-S. On Octo-

[1] The Statement of the Case is taken from the opinion below. "R." references are included only where supplementary facts are added. "R." refers to petitioner's separate Appendix filed in the Court of Appeals and which is part of the record filed with the Clerk of the Court.

ber 16, 1967, he turned in his Selective Service Registration Certificate and Notice of Classification to an officer of the government at a meeting protesting the Vietnam war (R. 2). On November 8, 1967, petitioner informed his local draft board, respondent here, that he had surrendered his draft cards. Pursuant to 32 C.F.R. §§ 1642.4(a) and 1642.12, the local board on December 1, 1967 declared petitioner delinquent[2] and, on the same date reclassified him I-A for failure to comply with 32 C.F.R. §§ 1617.1 and 1623.5, which require Selective Service registrants to have their Registration Certificates and Notices of Classification in their personal possession.

After denial by the state appeal board, on February 1, 1968, of petitioner's timely appeal of his I-A classification, his local board ordered him to report for induction the latter part of February, 1968. That induction date was postponed by the State Selective Service Director to allow the district court to hear petitioner's application for a temporary injunction.

On February 22, 1968, petitioner filed suit in the United States District Court, District of Minnesota, to enjoin his induction. On April 9, 1968, the district court issued an order denying the motion for a temporary injunction on the grounds that a decision on the merits would require a review of the propriety of petitioner's reclassification and such review at that posture of the case was prohibited by § 10(b)(3) of the Military Selective Service Act of 1967. Petitioner appealed from that order. While his

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[2] The Delinquency Notice (SSS Form 304) is set out in the Appendix, *infra*, p. 32a. Also set out in the Appendix, *infra*, pp. 28a-31a, are Local Board Memorandum No. 85, dated October 24, 1967, and the General Hershey letter of October 26, 1967, urging reclassification of registrants who surrendered their draft cards or who performed other acts thought by General Hershey to impair the national interest.

appeal was pending, his local board ordered him to report for induction on July 17, 1968. Petitioner applied to Judge Lord of the district court for an injunction or stay pending appeal. The application was denied. On July 16, Judge Blackmun of the Eighth Circuit, pursuant to Rule 8 of the Federal Rules of Appellate Procedure, granted petitioner's application for an injunction pending appeal to the Court of Appeals. Judge Blackmun's order is set out in the Appendix, *infra*, pp. 11a-17a.

The Court of Appeals affirmed on January 28, 1969. It held that " . . . where, as here, a registrant is deprived of a deferment that had been granted as a matter of administrative grace in the first instance, the courts can review the classification only in a criminal prosecution in a habeas corpus proceeding." App., *infra*, p. 9a. The court followed the decision in *Gabriel* v. *Clark*, 37 U. S. L. Week 3217, and rejected the analogy to *Oestereich* v. *Selective Service System Local Board 11*, 37 U. S. L. Week 4053.[3]

Reasons for Granting the Writ

1. Certiorari should be granted because the decision below conflicts with this Court's decision in *Oestereich* v. *Selective Service Local Board No. 11*, 37 U. S. L. Week 4053.

Oestereich v. *Selective Service*, *supra*, stands for two propositions: first, that delinquency reclassification is unlawful if the registrant involved qualified for a statutory exemption, and, second, that a bona-fide claim of such an

[3] It should be noted that the Court of Appeals may have been mislead by its belief that this Court had already refused to stay the induction in a delinquency reclassification case of an *undergraduate* II-S. See App., *infra*, p. 9a, note 6, where the Court of Appeals refers to *Shiffman* v. *Selective Service*, 391 U. S. 930 (1968), as such a case. *Shiffman* was in fact a II-A occupational deferment case.

unlawful reclassification is entitled to pre-induction judicial review despite the language of Section 10(b)(3).

Petitioner here, unlike *Breen* v. *Selective Service*, No. 1144, this Term, does not claim that his deferment is mandatory by the terms of the statute. Section 6(h)(1), involved in *Breen*, says that undergraduate students "shall" be deferred. Section 6(h)(2), involved here, authorizes the President to "provide for the deferment . . . of persons . . . in graduate study . . . found to be necessary to the maintenance of the national health, safety or interest." Pursuant to this authority, Reg. 1622.26 provides that "Any registrant who is entering his second or subsequent year of post-baccalaureate study without interruption on October 1, 1967, may be placed in Class II-S if his school certifies that he is satisfactorily pursuing a full-time course of instruction leading to his degree. . . . "

Accordingly, petitioner was placed in Class II-S. As put by Judge Blackmun, the issue then "is whether [petitioner] may be deprived of that classification solely for a reason other than the discontinuance of his otherwise qualifying graduate study." App., *infra*, p. 16a. We believe the answer to that question must be "No". If petitioner in *Oestereich* could not be deprived of his exemption because the deprivation would violate a statutory command, then petitioner here cannot be deprived of his deferment because the deprivation would violate a constitutional command. That command is that a right bestowed by government cannot be withdrawn or withheld for arbitrary reasons or by arbitrary procedures.

The general rule can be analyzed from several points of view. Professor Van Alstyne in The Demise of The Right-Privilege Distinction in Constitutional Law, 81 Harv. L.

Rev. 1439 (1968), broke down the rule into three categories relevant here.

The first category is the "doctrine of unconstitutional conditions." "The doctrine would appear to apply . . . to every . . . case where the enjoyment of a government-connected interest [here, petitioner's II-S classification] is conditioned upon a rule requiring that one abstain from the exercise of some right protected by an express clause in the Constitution" [here, petitioner's right under the First Amendment to protest the war in Vietnam]. *Id.* at 1446. See *Sherbert* v. *Verner,* 374 U. S. 398 (1963); *Dixon* v. *Alabama State Bd. of Educ.,* 294 F. 2d 150 (5th Cir.), *cert. denied,* 368 U. S. 930 (1961).

The second category is described as "indirect effects and constitutional rights." " . . . [A] person whose status in the public sector is threatened by administrative action [here, petitioner's II-S classification] should have a right to a fair hearing to make certain that the action is not in fact being taken for reasons which are constitutionally improper." [See section 4, *infra,* p. 11, concerning the right to a due process hearing before petitioner may be punished for turning in his draft cards.] *Id.* at 1453. See *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 185 (1961); *Homer* v. *Richmond,* 292 F. 2d 719, 722 (D. C. Cir. 1961) ("One may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law.")

The third category is equal protection. "Even a privilege, benefit, opportunity, or public advantage [here, petitioner's II-S classification] may not be granted to some but withheld from others where the basis of classification

and treatment is arbitrary." [Here, the arbitrary application of the Selective Service delinquency regulations.] See *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Douglas* v. *California*, 372 U. S. 353 (1963).

Given this analysis of the withdrawal of petitioner's II-S classification, the restrictive language of Section 10 (b)(3) ought not bar judicial review of petitioner's reclassification for, as stated above, its withdrawal violates a constitutional command. Furthermore, determination of the issues in this case, cast in the analysis above, does not concern the "exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved." *Oestereich* v. *Selective Service*, 37 U. S. L. Week 4054. In addition, the withdrawal of petitioner's deferment was based upon "conduct or activities unrelated to the merits of granting or continuing that [deferment]." *Ibid.*

For these reasons, certiorari should be granted to decide whether petitioner can contest his reclassification in a pre-induction civil suit notwithstanding the language of Section 10(b)(3).

2. Certiorari should be granted to determine whether Section 10(b)(3) precludes judicial review where it is claimed that a statute or administrative regulations are unconstitutional on their face or as applied.

The reasons for granting the writ to review this question are identical to the reasons set forth at pp. 13-15 of the petition for certiorari in *Breen* v. *Selective Service*, No. 1144, this Term. Petitioner respectfully refers the Court to that material.

3. Certiorari should be granted to settle the important question whether petitioner's declaration of delinquency, punitive reclassification, and order to report for induction, is authorized by statute or regulation.

In its brief in *Oesterreich,* the government conceded grave doubts concerning the validity of the delinquency procedures (p. 54):

> "It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction, regardless of its relationship to the individual's status as exempt or deferred or whatever. Congress prescribed criminal prosecution for such violations, and also provided for exemptions and deferments for certain classes of individuals to reflect considerations of national interest apart from simply raising manpower for the Army. Termination of such status through delinquency reclassification may effectively undermine that congressional determination and thus be inconsistent wtih the Selective Service Act."

The government also granted that the unfettered discretion given to local boards under Reg. 1642.4(c) to restore a registrant's prior classification presented a serious question whether the regulations did not conflict with the Act (pp. 54-55). The possibility of constitutional infirmities was also recognized by the government including the delegation of power to local boards "without standards for the exercise of sweeping discretion given them by the regulations," and the "absence of any specified nexus or reasonable relationship between the violation which triggers re-

classification and induction, and the registrant's status vis-à-vis the Selective Service System [which] might be viewed as inconsistent with due process notions" (p. 56).

The government also referred not unfavorably to the opinion of Judge Dooling in *United States* v. *Eisdorfer*, 1 S. S. L. R. 3115 (E. D. N. Y. 1968), in which he observed that "The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges." *Id.* at 3116.

This Court in *Oestereich* recognized that "Congress did not define delinquency; nor did it provide any standards for its definition by the Selective Service System." *Supra* at 4054. The Court found, of course, that to whatever use the delinquency regulations might be put, revocation of statutory exemptions was not one of them. And, added the Court, "Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classification, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions." *Ibid.*

It is apparent, therefore, that there are serious and unresolved statutory and constitutional issues present which should be settled by this Court.

In addition, there are important issues of federal law involved in the question whether petitioner's delinquency, reclassification, and priority induction are authorized by the Selective Service Regulations themselves. Petitioner respectfully refers the Court to pp. 18-21 of the petition for certiorari in *Breen* v. *Selective Service*, No. 1144, this Term, where this argument is set forth.

4. **Certiorari should be granted to decide whether the punitive reclassification of petitioner violates the due process clause of the Fifth Amendment and the Sixth Amendment.**

5. **Certiorari should be granted to decide whether Reg. 1642.4, upon which petitioner's delinquency, reclassification, and induction order are based, is vague and overbroad.**

6. **Certiorari should be granted to decide whether petitioner's surrender of his Registration Certificate was an act of speech protected by the First Amendment.**

The reasons for granting the writ to review the issues in Sections 4, 5 and 6 are identical to the reasons set forth at pp. 15-17 and 21-26 of the petition for certiorari in *Breen* v. *Selective Service,* No. 1144, this Term. Petitioner respectfully refers the Court to that material.

CONCLUSION

For the reasons set forth above, the writ should be granted.

Respectfully submitted,

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March 19, 1969

APPENDIX

Opinion of the United States Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19331

ROLF J. KOLDEN,

Appellant,

—v.—

SELECTIVE SERVICE LOCAL BOARD NO. 4,
Beltrami County, Minnesota,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

[January 28, 1969.]

Before:

MATTHES, GIBSON and BRIGHT,

Circuit Judges.

MATTHES, *Circuit Judge*:

Rolf J. Kolden, appellant, was at all pertinent times a graduate student at Harvard University, working for a Ph. D. degree. Until he turned in his draft card to an officer of the Government on October 16, 1967, at a meet-

ing protesting the Viet Nam War, appellant possessed a II-S classification (student deferment). On November 8, he informed his local draft board (Beltrami County, Minnesota) that he had surrendered his draft card. Pursuant to 32 C.F.R. §§ 1642.4(a) and 1642.12[1] the local board on December 1, 1967, declared appellant delinquent and reclassified him I-A for failure to comply with regulations 32 C.F.R. §§ 1617.1 and 1623.5, which require each registrant to have in his possession a Selective Service registration card and a notice of classification.

After a denial by the appeal board of appellant's timely appeal of his I-A classification, his local board ordered him to report for induction.[2] Subsequently, on February 22, 1968, appellant filed this action in the United States District Court for the District of Minnesota, first, for a temporary injunction to stay his induction into the Armed Forces and, second, upon a full hearing of his claim for a permanent injunction against his induction.

On April 9, the district court (Judge Lord) issued an order denying the motion for a temporary injunction on

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[1] Section 1642.4(a) provides:

"Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form 153), the local board may declare him to be a delinquent."

Section 1642.12 in pertinent part provides:

"'Any delinquent registrant . . . may be classified in or reclassified into Class I-A, Class I-A-O or Class I-O, whichever is applicable, regardless of other circumstances . . .'"

[2] At the time of the filing of the complaint, appellant had received an Order to Report for Induction, SSS Form 252, but the date of induction had not yet arrived. The Order to Report for Induction was dated the same day as the notice of denial of appeal by the appeal board, February 1, 1968.

the grounds that a decision on the merits would require a review of the propriety of appellant's reclassification, and such review at that posture of the case is prohibited by § 10(b)(3) of the Military Selective Service Act, 81 Stat. 100, 50 U.S.C. App. 460(b) (3). From that order, Kolden appealed to this Court. While his appeal was pending, his local board ordered him to report for induction on July 17, 1968. He then petitioned Judge Lord for an injunction or stay pending his appeal. The petition was denied. On July 16, Judge Blackman of this Court, pursuant to Rule 8 of the Federal Rules of Appellate Procedure, granted appellant's request for an injunction pending determination of his appeal to this Court. Judge Blackman further ordered that the appeal be expedited.[3]

Essentially, appellant contends his reclassification was illegal because: (1) the declaration that he was delinquent, his reclassification to I-A and his induction order are punitive in nature and impose punishment without due process of law; (2) the action by the board designating him a delinquent for failure to possess his draft card and reclassifying him I-A violated his freedom of speech protected by the First Amendment.

Section 10(b)(3) of the Military Selective Service Act, *supra*, precludes judicial review of any Selective Service classification prior to induction. Congress, through this statute, codified long-established prior case law. *Witmer* v. *United States*, 348 U.S. 375 (1955); *Estep* v. *United*

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[3] When this case was submitted in September, 1968, *Oestereich* v. *Selective Service System Local Bd. No. 11*, —— U.S. —— (December 16, 1968) and *Clark* v. *Gabriel*, —— U.S. —— (December 16, 1968), were pending in the Supreme Court. We concluded that the decision of the Supreme Court in *Oestereich* and *Gabriel* would probably be relevant to the issues in this case, and consequently we deferred our opinion.

States, 327 U.S. 114 (1946). Section 10(b) (3) in applicable part states:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

In *Oestereich* a local draft board, in face of a statutory mandate that divinity students were exempt from military service (§ 6(g) of the Military Selective Service Act, 50 U.S.C. App. 456(g)),[4] declared a divinity student a delinquent and reclassified him 1-A after he had returned his registration card to the Government. The Court held that the local board's action in depriving the student of a statutory exemption was "blatantly lawless," and in

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[4] This section reads as follows:

"Regular or duly ordained ministers of religion, as defined in this title, * * * and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled shall be exempt from training and service (but not from registration) under this title * * *"

such an instance § 10(b) (3) did not prevent the judiciary from restoring him to the classification to which he was legally entitled.

Speaking for the Court, Mr. Justice Douglas stated:

> "Since the exemption granted divinity students is plain and unequivocal and in no way contested here, and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed legislative standards, we conclude that preinduction judicial review is not precluded in cases of this type."

Restricting its decision to the particular facts of the case before it, the Court upheld the constitutionality of § 10(b) (3) in stating: "Our construction leaves § 10(b) (3) unimpaired in the normal operations of the Act."

In *Gabriel* a registrant claiming conscientious objector status sought to have his induction enjoined on the grounds that his I-A classification was without basis in fact, that the local board had misapplied the statutory definition of conscientious objector and that members of his board were prejudiced against conscientious objectors. The district court granted registrant a preliminary injunction and held § 10(b) (3) unconstitutional on the basis that it deprived a person of any meaningful review. The Supreme Court reversed the district court's holding and pointed out that local boards possess statutory discretion to make proper classifications, evaluate evidence and determine whether a claimed exemption is deserved. The Court, in summary, stated:

> "To allow pre-induction judicial review of such determinations would be to permit precisely the kind of

'litigious interruptions of procedures to provide necessary military manpower' (113 Cong. Rec. 8052 (June 12, 1967) (report by Senator Russell on Conference Committee action) which Congress sought to prevent when it enacted § 10(b) (3).

"We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction. *Estep* v. *United States,* 327 U.S. 114 (1946). *Falbo* v. *United States,* 320 U.S. 549 (1944)." —— U.S. at ——.

The question we must now decide is whether in light of *Oestereich* and *Gabriel,* § 10(b) (3) bars judicial review of appellant's local board's action in reclassifying him I-A. Because appellant did not possess a statutorily-required deferment, but one granted only by the discretion of the local board, we hold that § 10(b) (3) bars review at this stage of the Board's actions.

This case, unlike *Oestereich,* centers around appellant's classification under § 6(h), 50 U.S.C. App. § 456(h), which does allow the local board discretion in granting deferments. Basically, this section provides for deferments for (1) undergraduate college students; (2) persons engaged in certain occupations vital to the national health, safety or interest; (3) graduate students; (4) certain persons who have others dependent upon them for support; (5) fathers with families.

Section 6(h) makes a distinction between deferments for undergradute students and those for graduate students. The statute *requires* the President to provide for undergraduate deferments except in time of necessity, but only *authorizes* him to do so for graduate students.

In applicable part § 6(h) (1) states:

> "Except as otherwise provided in this paragraph, the President *shall*, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. *No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest.*" (Emphasis added.)

The section clearly mandates deferments for full-time undergraduate students, but further provides that no person who has been deferred as an undergraduate student and has since been graduated shall again be deferred. The statute, however, does provide for an exception which allows but does not require deferments for graduate study necessary to the national health, safety or interest.

Thus it is apparent that § 6(h) (1), when considered in relation to § 6(h) (2), to which it logically refers, clearly reveals that Congress has made graduate deferments rest upon the discretion of the local boards. The latter section, in pertinent part, states:

> "Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons whose employment * * * *or whose activity in graduate study, research or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest: Provided, That no person within any such category shall be deferred except upon the basis of his individual status* * * *." (Emphasis added.)[5]

Thus, if appellant here had been an undergraduate student duly possessing a II-S classification who had been reclassified I-A for reasons other than ceasing to be a

---

[5] The regulations promulgated pursuant to § 6(h) further illustrate the distinction between the statutorily required undergraduate deferment and the statutorily permitted graduate deferment. 32 C.F.R. § 1622.25 and § 1622.26.

full-time student in good standing, the case would be more closely analogous to *Oestereich's* situation.[6] But where, as here, a registrant is deprived of a deferment that had been granted as a matter of administrative grace in the first instance, the courts can review the classification only in a criminal prosecution or a habeas corpus proceeding. In addition to *Oestereich* and *Gabriel*, see, for example, *Breen* v. *Selective Service Local Bd. No. 16*, 284 F.Supp. 749 (D. Conn. 1968), *aff'd*, —— F.2d —— (2d Cir. Jan. 10, 1969); *Carpenter* v. *Hendrix*, 277 F.Supp. 660 (N.D. Ga. 1967); *Moskowitz* v. *Kindt*, 273 F.Supp. 646 (E.D. Pa. 1967), *aff'd*, 394 F.2d 648 (3d Cir. 1968); *Muhammed Ali* v. *Connally*, 266 F.Supp. 345 (S.D. Texas 1967); *United States* v. *Lybrand*, 279 F.Supp. 74 (E.D. N.Y. 1967).[7]

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[6] Since the question is not before us we refrain from expressing an opinion as to whether § 10(b) bars judicial review of a board's reclassification of *undergraduate* students from II-S to I-A for becoming delinquent. The Government in its brief argues that cases involving deferments under § 6(h) should be barred from review by § 10(b) (3) since § 6(h) authorizes deferments "under such rules and regulations as [the President] may prescribe." The Government argues that this grant of authority to prescribe rules and regulations is sufficiently broad to encompass the regulations establishing a delinquency procedure as well as the regulation specifying the circumstances under which deferments will be granted. It further contends that the Supreme Court's denial of stay in *Shiffman* v. *Selective Service Bd. No. 5*, 391 U.S. 930 (1968), represents an acceptance of this distinction. In *Shiffman*, registrant, who was declared a delinquent when he destroyed his draft card, and was reclassified from II-S to I-A, was denied an injunction against his induction on the basis of § 10(b) (3). See also a companion case, *Zigmond* v. *Selective Service Bd. No. 16*, 391 U.S. 930 (1968). *Contra*, *Kimball* v. *Selective Service Local Bd. No. 15*, 283 F.Supp. 606 (S.D. N.Y. 1968).

[7] On January 14, 1969, the Supreme Court, by per curiam, affirmed *Boyd* v. *Clark*, United States District Court, S. Dist. N.Y., holding that § 10(b) (3) bars court, prior to registrants' induction, from entertaining their suit challenging constitutionality of § 6(h) (1)'s student deferment provision. —— U.S. —— (37 Law Week No. 27 at 3241 and 3246).

Thus, we hold simply that appellant does not fall within the statutory exemption exception to § 10(b) (3) as laid down in *Oestereich,* and that appellant may not test the validity of the board's action in this proceeding. Since we are precluded at this time from reviewing the propriety of appellant's classification, we do not reach the merits of his contentions.

In summary, based upon the rationale of *Oestereich* and *Gabriel,* the time has not arrived for appellant to challenge the validity of his reclassification. Consequently, we affirm the denial of the temporary injunction and direct the district court to dismiss the action.

Order Granting Injunction Pending Appeal

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 19,331

ROLF J. KOLDEN,

Appellant,

—VS.—

SELECTIVE SERVICE LOCAL BOARD NO. 4,
BELTRAMI COUNTY, MINNESOTA,

Appellee.

The application of Rolf J. Kolden, the appellant herein, for an injunction to restrain the enforcement of an order of the appellee requiring Kolden to report for induction on July 17, 1968, came duly on for hearing before the undersigned, a Judge of the United States Court of Appeals for the Eighth Circuit, on July 16, 1968, at Rochester, Minnesota. The appellant appeared by Chester Bruvold of Minneapolis, Minnesota, and by John S. Connolly of Saint Paul, Minnesota. The appellee appeared by Earl Cudd, Assistant United States Attorney for the District of Minnesota.

After having examined and reviewed the record and the application submitted, and having heard the argument of counsel, it appeared that:

1. On April 9, 1968, the Honorable Miles W. Lord, United States District Judge for the District of Minnesota, issued

his order denying Kolden's motion for a preliminary injunction.

2. On April 11, 1968, Judge Lord, pursuant to Rule 60, Fed. R. Civ. P., in writing amended said order by the correction of one word therein.

3. On April 19, 1968, Kolden, pursuant to then Rule 73, Fed. R. Civ. P., filed his notice of appeal, from the denial of his motion for a preliminary injunction, to the United States Court of Appeals for the Eighth Circuit.

4. On July 2, 1968, the appellee issued to Kolden its Notice of New Reporting Date for Induction or Armed Forces Physical Examination requiring him to report at Bemidji, Minesota, at five p.m. on the 17th day of July, 1968.

5. On July 15, 1968, Kolden presented his Application for Writ of Injunction or Stay Pending Review on Appeal to Judge Lord and requesting that the order requiring him to report on July 17 be enjoined or stayed pending the decision of his appeal and final disposition of his case.

6. Upon hearing, Judge Lord denied said application without supporting memorandum.

7. The application to the undersigned was then presented.

8. The submission of the application to a panel or division of this court is impracticable due to the requirements of time and the fact that the judges of this court nearest to Minneapolis and Saint Paul, Minnesota, are in Fargo,

North Dakota, Duluth, Minnesota, and Rochester, Minnesota, respectively, and cannot conveniently be called together, and it is therefore an exceptional situation which may properly be made to and considered by a single judge of this court, within the meaning and application of Rule 8 or the Federal Rules of Appellate Procedure. However, the matter has been reviewed by the undersigned by telephone with the Honorable Charles J. Vogel, Senior Circuit Judge of this court, and Judge Vogel joins in the issuance of this order.

9. The district court by its order of April 9, 1968, found:

> "The facts of this case are simple. Kolden is a graduate student at Harvard University. On October 16, 1967, Kolden turned over his draft card to an officer of the United States Government. On November 8, 1967, Kolden wrote to his Selective Service Local Board informing it that he had turned in his draft card. On December 1, 1967, the defendant Selective Service Local Board declared Kolden delinquent because of his failure to comply with regulations 1617.1 and 1623.5 which require each selective service registrant to have in his possession a Selective Service registration card and a Notice of Classification."

10. It is further represented that Kolden is in his third year of graduate work at Harvard; that he is working for his Ph.D. degree; that he attained the age of 26 in February 1968; that he possessed a II-S classification until he was declared delinquent by the appellee on December 1, 1967, and reclassified I-A; that he filed a timely appeal of that I-A classification; and that this was denied by the

Appeal Board February 1, 1968, and his 1-A reclassification affirmed:

11. Kölden is ordered by the appellee to report for induction or armed forces physical examination on July 17, 1968.

On May 20, 1968, the Supreme Court of the United States granted certiorari in its then No. 1246 (No. 46 on the 1968-69 Docket), Oestereich v. Selective Service System Local Board No. 11, ——— U.S. ———, 36 L.W. 3437. The United States District Court for the District of Wyoming had denied Oestereich's motion for a temporary restraining order, 280 F. Supp. 78. The Tenth Circuit had affirmed by a per curiam order "for the reasons set forth in the memorandum decision of the trial court", 390 F. 2d 100. In *Oestereich*, the Solicitor General suggested, in his memorandum filed with the Supreme Court, that Oestereich, who was a fulltime student in a recognized divinity school, enjoyed a statutory exemption under 50 U.S.C. App. § 456(g); that the language of Pub. L. 90-40, amending § 460(b)(3), effective June 30, 1967, confining judicial review of a classification by a local board, may possibly be construed to exclude board action contrary to a statutory exemption; that although the question of the board's power to disregard the statute could be raised in defense to a criminal prosecution or in a habeas corpus proceeding after induction, this "is a very heavy burden to put on the citizen if the board has in fact acted contrary to the terms of the statute". Such is the posture of the Oestereich case now pending in the Supreme Court.

A similar situation is presented in Kimball v. Selective Service Local Board No. 15, 283 F. Supp. 606 (S.D.N.Y. 1968). There the plaintiff was a fulltime undergraduate

college student and entitled to deferment, because of that fact, under 50 U.S.C. App. § 456(h)(1), as amended by Pub. L. 90-40. The court referred to the Oesterreich situation and the Solicitor General's memorandum there, and concluded that the distinction attempted to be drawn by the government between an exemption under § 456(g) and a deferment under § 456(h) "is one without legal significance". It enjoined the induction of that plaintiff pending full determination of the issues of fact and law.

Compare, however, the Supreme Court's denial of certiorari on May 27, 1968, in Shiffman v. Selective Service Board No. 5, 36 L.W. 3451, and Zigmond v. Selective Service Local Board No. 16, 36 L.W. 3451, with Mr. Justice Douglas dissenting.

It is, of course, recognized that classification orders are usually to be reviewed when raised as a defense in a criminal proceeding. See Witmer v. United States, 348 U.S. 375 (1955). Further, the courts have been reluctant to scrutinize judicially any phase of the operation of the selective service system. Wolff v. Selective Service Local Board No. 16, 372 F. 2d 817, 822 (2 Cir. 1967).

Concededly, Kolden does not enjoy a statutory exemption of the kind to which Oesterreich may be entitled under § 456(g). Neither does he now enjoy an undergraduate deferment of the kind to which Kimball may be entitled under § 456(h)(1). Nonetheless, § 456(h)(2), after the 1967 amendment, also provides:

> "No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under subsection (a) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under

regulations governing hardship deferments), *or for graduate study*, occupation, or employment necessary to the maintenance of the national health, safety, or interest." (Emphasis supplied.)

Further, the regulations, 32 C.F.R., provide:

"32 C.F.R. 1622.26 Class II-S: Registrant Deferred Because of Activity in Graduate Study . . .

"(b) Any registrant who is entering his second or subsequent year of post-baccalaureate study, without interruption on October 1, 1967, may be placed in Class II-S if his school certifies that he is satisfactorily pursuing a full-time course of instruction leading to his degree; but such registrant shall not be deferred . . . [for] a course of study leading to doctoral or professional degree or the equivalent (or combination of master's and doctoral degrees) for more than a total of five years, including any of the years already used in such course of study, or for one additional year, whichever is greater. . . ."

It therefore appears that Kolden's receipt of his II-S classification originally was made in conformity with the provisions of the Act and of the regulations, both heretofore quoted. If this is so, the issue then presented is whether he may be deprived of that classification solely for a reason other than the discontinuance of his otherwise qualifying graduate study.

We are sufficiently satisfied that Kolden's case presents enough factual similarity to the cases of *Oestereich* and *Kimball* to justify, in the light of the decision in *Kimball* and of the Supreme Court's granting of certiorari in *Oe-*

reich, injunctive relief pending disposition of his appeal. Eventually, on the merits, of course, Kolden must establish the jurisdictional amount required under 28 U.S.C. § 1331 (a), and which he has alleged in his complaint, or otherwise appropriately establish federal court jurisdiction.

We are also satisfied that Kolden, if relief is not now granted to him, is subject to irreparable injury and that, in contrast, the appellee, if relief is granted, will be subject to little, if any, injury.

It is desirable that this case be advanced for hearing.

Accordingly, it is ordered that Kolden's induction be and hereby is enjoined pending determination of his appeal to this court. This relief, however, is conditioned upon Kolden's filing of his appendix and brief with the Clerk of this court no later than August 6, 1968. The responsive brief shall then be filed, as Rule 31 (a), Fed. R. App. P., provides, within 30 days after service of Kolden's brief.

It is further ordered that the Clerk of this court shall place said appeal on the calendar of this court for oral argument, if desired, and for submission at the September session scheduled for the week of September 9, 1968.

Inasmuch as a cost bond on appeal has been filed, no additional bond under Rule 8(b), Fed. R. App. P., is required.

Dated at Rochester, Minnesota, this 16th day of July, 1968.

HARRY A. BLACKMUN
Judge of the United States Court
of Appeals for the Eighth Circuit

United States District Court, District of Minnesota, Memorandum Decision of Hon. Miles Lord, U.S.D.J.

This is a civil action brought by Rolf J. Kolden against Selective Service Local Board No. 4, Beltrami County, Minnesota. Now before the Court is the plaintiff's motion for preliminary injunction.

The facts of this case are simple. Kolden is a graduate student at Harvard University. On October 16, 1967, Kolden turned over his draft card to an officer of the United States Government. On November 8, 1967, Kolden wrote to his Selective Service Local Board informing it that he had turned in his draft card. On December 1, 1967, the defendant Selective Service Local Board declared Kolden delinquent because of his failure to comply with regulations 1617.1 and 1623.5 which require each selective service registrant to have in his possession a Selective Service registration card and a Notice of Classification. These are the cards commonly referred to as draft cards. On February 1, 1968, following the denial of appeal from the classification, the defendant Selective Service Local Board mailed to Kolden an order to report for induction. This complaint and motion for preliminary injunction followed.

Decision on the merits on the issues raised by the complaint requires a review of the propriety of the reclassification. Since it is apparent, however, that such issues are not now justiciable and the review requested cannot at this time be granted, the motion must be denied.

As a general rule, classification orders may be reviewed only when raised as a defense in criminal proceedings. *Hitchcock v. United States*, 348 U.S. 375, 75 S. Ct. 392, 79 L. Ed. 428 (1955). The basic reason for this rule is the need of

the administrative process to function with a minimum of interference. The courts are especially reluctant to interfere when a subsequent administrative action may make moot the matter then before the court. Nor will the courts hear a cause when the action complained of has not caused, or is not certain to cause injury to the complaining party. *Wolff v. Selective Service Board No. 16*, 372 F. 2d 817 (1967). In this particular case, Kolden may not pass the induction examinations and the issues here raised would become moot.

This restraint on judicial review which had been a matter of case law, is now a matter of statutory law in the selective service area. 50 U.S.C. App. 460(b) (3) which became effective in June, 1967, reads in part:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form . . .

In several recent cases in which review of classification has been requested at this same stage of the selective service process, such review has been decided. In two of these cases the facts were essentially similar to those of the instant case. See *Breen v. Selective Service Board No. 16*, 30 U.S.L. Week 2597 (D. Conn. March 13, 1968) and *Oesterreich v. Selective Service System Local Board No. 11*, No. 9902, 9th Cir., Feb. 21, 1968. See also *MacKouse v. Kindt*, 275 F. Supp. 646 (E.D. Pa. 1967).

In one often cited case, *Wolff* v. *Selective Service Board No. 16*, *supra*, review was granted at a similar stage in the selective service procedure. That case, however, was decided prior to the enactment of the statute just quoted. Moreover, the *Wolff* case involved reclassification resulting from participation in a protest demonstration. The court was there concerned particularly with the "chilling"-effect on free speech which might result from the classification.

The current status of the *Wolff* case is uncertain. While there may yet be some circumstances in which judicial review might be granted at this stage, this is not one. The Court does not decide at this time that the return of the draft card under these circumstances is symbolic speech protected by the First Amendment. However, see *O'Brien* v. *United States*, 376 F. 2d 538 (1st Cir. 1967) in which the court upheld a criminal conviction for non possession of a draft card in the face of an argument that the card has been destroyed as an exercise of free speech.

Without deciding on the propriety of the reclassification at this stage, the existence of the regulations requiring the registrant to carry the draft card provide a standard which permits the registrant to know exactly what conduct will result in Board action and as such, the far reaching "chilling effect" feared by the court in *Wolff* is not present in the instant case.

On some occasions courts have reviewed classifications at this stage where it is clear that there was no basis in fact for the classification (now provided for in the statute), where no opportunity to contest the classification was allowed or where a board acted in clear violation of its own regulations. None of these circumstances exist in the instant case.

The Court wishes to make clear that no determination on the merits has been made. The Court has determined only that considering the statute limiting review and the long established case law, this Court may not review this matter at this time.

For this reason, the motion is hereby DENIED.

MILES W. LORD
United States District Judge

Dated: April 9, 1968

(Filed Apr. 10, 1968. Frank A. Massey, Clerk, by Hazel E. Gabrielson, Deputy.)

AMENDMENT TO ORDER

Attorneys for Plaintiff: Joseph Perry, John S. Connolly, Reese C. Johnson, Peter Dorsey, John R. Goetz, Chester Bruvold, Sherman Bergstein, Thomas A. Keller III, Esqs.

Attorney for Defendant: Patrick J. Foley, United States Attorney, Minneapolis, Minn.

Under the power granted by Rule 59, Federal Rules of Civil Procedure, the order in the instant case is hereby amended as follows:

On page 3, following the quotation of 50 U.S.C. App. 460 (b) (3), the first sentence to be changed from: "In several recent cases in which review of classification has been requested at this stage of the selective service process, such

Military Selective Service Act of 1967

Section 10(b)(3), Military Selective Service Act of 1967; 50 App. U.S.C. Sec. 460(b)(3):

No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Section 6(h)(2), Military Selective Service Act of 1967; 50 App. U.S.C. Sec. 546(h)(2):

(2) Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons whose employment in industry, agriculture, or other occupations or employment, or whose continued service in an Office (other than an Office described in subsection (f)) under the United States or any State, territory, or possession, or the District of Columbia, or whose activity in graduate study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors

is found to be necessary to the maintenance of the national health, safety, or interest: *Provided*, That no person within any such category shall be deferred except upon the basis of his individual status: *Provided further*, That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces under the provisions of section 4(a) of this Act until the thirty-fifth anniversary of the date of their birth. This proviso shall not be construed to prevent the continued deferment of such persons if otherwise deferrable under any other provisions of this Act."

Selective Service Regulations

Selective Service Regulation 1622.26 Class 1-S; Registrant Deferred Because of Activity in Graduate Study. (a) In Class 1-S shall be placed any registrant who is satisfactorily pursuing a course of graduate study in medicine, dentistry, veterinary medicine, osteopathy or optometry, or in such other subjects necessary to the maintenance of the national health, safety, or interest as are identified by the Director of Selective Service upon the advice of the National Security Council.

(b) Any registrant who is entering his second or subsequent year of post-baccalaureate study without interruption on October 1, 1967, may be placed in Class 1-S if his school certifies that he is satisfactorily pursuing a full-time course of instruction leading to his degree; but such registrant shall not be deferred for a course of study leading to a master's degree or the equivalent for more than one additional year, or for a course of studying leading to a doctoral or professional degree or the equivalent (or combination of master's and doctoral degrees) for more than a total of five years, inclusive of the years already used in such course of study, or for one additional year, whichever is greater. Any registrant enrolled for his first year of post-baccalaureate study in a graduate school or a professional school on October 1, 1967, or accepted for admission involving enrolled status on October 1, 1967, may be placed in Class 1-S if he has entered the first class commencing after the date he completed the requirements for admission and shall be deferred for one academic year only, or until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier.

Petitioners file this Supplemental Brief pursuant to Rule 24(5), Rules of the Supreme Court, to call attention to intervening matter not available at time of their last filing.

Each of the three petitioners at bar has raised the question, among others, whether the application of the Selective Service delinquency regulations in their cases was a form of punishment. If so, petitioners claim that, pursuant to *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), the punishment could not be imposed without observance of essential procedural due process requirements.

If there were any doubt that the application of the delinquency procedures was for purposes of punishment, that doubt is resolved by the correspondence set out in the Appendix, *infra*.

The February 3, 1969 letter from Captain Kenneth S. Goodrich, Chief, Manpower Division, Selective Service System, makes it perfectly clear that the Selective Service System treats the delinquency procedure as the precise equivalent of punishment and the precise alternative to prosecution. Speaking of the consequences of this Court's decision in *Oestereich* v. *Selective Service*, Captain Goodrich suggests to the Oklahoma State Director of Selective Service that registrants whose IV-D exemptions have been withdrawn should be reclassified IV-D, but that their delinquency status need not be removed. He goes on to say:

> "Following reclassification of these registrants, if they are retained in a delinquency status, they should then be reported to the United States Attorney for prosecution for failure to have in their possession their selective service cards.

In the event that the United States Attorney, in each of these cases, declines to prosecute, the registrants should be continued in a delinquent status. At such time as they no longer qualify for a IV-D classification, they may at that time be reclassified into Class I-A, unless they qualify for Class I-O, and ordered to report for induction as delinquents, provided they are still within the age of liability. If they qualify for Class I-O, they should be ordered to perform civilian work in lieu of induction."

Nothing could be more plain, therefore, that the Selective Service System treats the delinquency procedure as a means to punish registrants for alleged violations of the Military Selective Service Act or the Selective Service Regulations.

Respectfully submitted,

EMANUEL MARGOLIS
25 Bank St.
Stamford, Conn.

LAWRENCE P. WEISMAN
955 Main St.
Bridgeport, Conn.

MELVIN L. WULF
156 Fifth Ave.
New York, N. Y.

Attorneys for Petitioner
Timothy J. Breen

March 29, 1969

APPENDIX

(Letterhead—National Headquarters, Selective Service System, Washington, D. C. 20435)

Feb. 28, 1969

Mr. Richard K. Snyder
TYLER, COOPER, GRANT, BOWERMAN & KEEFE
Counsellors at Law
Post Office Box 1936
New Haven, Connecticut 06509

Subject: HICKS, William Scott
SS No. 34-76-42-814
STROUP, George W., III
SS No. 34-76-44-651

Dear Mr. Snyder:

This is to acknowledge receipt of your letter dated February 4, 1969, regarding the cases of the above-named registrants.

You state in your letter that repeated attempts to ascertain the status of these cases have been unavailing. You further request our response to five questions relating to the processing of these cases.

Since we do not have the files of these two registrants at this Headquarters, we are unable to furnish the information requested by you. Under section 1606.32 of the Selective Service Regulations (32 C.F.R. 1606.32), the registrant or anyone having written authority from him may examine his file at any time during which the local board is open for the regular conduct of business.

Processing in the cases of these registrants had been temporarily suspended pending the decision of the Supreme Court in the Oestereich case. Following the decision of the Court in that case, we have, upon request, furnished to the respective State Directors our suggestions for further processing in cases of this type. We enclose herewith for your information a copy of our letter to the Oklahoma State Director respecting the cases of these two registrants which, we believe, you will find to be self-explanatory.

For The Director,

/s/ Roy R. Bartlett
Lt. Colonel, JAGC
Assistant General Counsel

Enclosure

COPY

3 February 1969

State Director of Selective Service
810 Leonhardt Building
Oklahoma City, Oklahoma

Subject: William Scott Hicks
SS No. 34-76-42-814

George W. Stroup
SS No. 34-76-44-651
Your Files: 400-2

Dear Colonel Hope:

Attached are the selective service files of the subject registrants that were received with your letters of 21 November 1968.

The local board should advise the registrants that their classifications are going to be reopened. Each registrant should be requested to complete a Current Information Questionnaire (SSS Form 127) and to submit current information from his theological or divinity school and his church or religious organization reflecting his entitlement to a ministerial exemption. When such information is submitted, the registrants should be reclassified according to all of the information contained in their files. It is recommended that the delinquency not be removed. Section 1642.4(a) of the Selective Service Regulations does not require the reclassification of a registrant upon his being declared to be a delinquent. If the local board classifies them in Class IV-D, they should be notified that their

delinquencies have not been removed, if such is the decision of the local board.

Following reclassification of these registrants, if they are retained in a delinquency status, they should then be reported to the United States Attorney for prosecution for failure to have in their possession their selective service cards.

In the event that the United States Attorney, in each of these cases, declines to prosecute, the registrants should be continued in a delinquent status. At such time as they no longer qualify for a IV-D classification, they may at that time be reclassified into Class I-A, unless they qualify for Class I-O, and ordered to report for induction as delinquents, provided they are still within the age of liability. If they qualify for Class I-O, they should be ordered to perform civilian work in lieu of induction.

For the Director,

KENNETH S. GOODRICH
Captain USNR
Chief, Manpower Division

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APR 21 1969
JOHN F. DAVIS, CLERK

No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

ROLF J. KOLDEN, PETITIONER

v.

SELECTIVE SERVICE LOCAL BOARD NO. 4

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,
MORTON HOLLANDER,
RALPH A. KUNZ,
Attorneys,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1175

ROLF J. KOLDEN, PETITIONER

v.

SELECTIVE SERVICE LOCAL BOARD NO. 4

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 18a–22a) is unreported. The opinion of the court of appeals (Pet. App. 1a–10a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1969. The petition for a writ of certiorari was filed on March 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460(b)

347-115—69

(3)) prohibits pre-induction judicial review of a 1-A delinquency reclassification of a graduate student formerly classified II-S.

STATUTES AND REGULATIONS INVOLVED

Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460 (b)(3)) provides, in pertinent part:

> * * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. * * *

Section 6(h)(2) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 456(h)(2)) provides:

> (2) Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons whose employment in industry, agriculture, or other occupations or

> employment, or whose continued service in an Office (other than an Office described in subsection (f)) under the United States or any State, territory, or possession, or the District of Columbia, or whose activity in graduate study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest: *Provided,* That no person within any such category shall be deferred except upon the basis of his individual status: *Provided Further,* That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces under the provisions of section 4(a) of this Act until the thirty-fifth anniversary of the date of their birth. This proviso shall not be construed to prevent the continued deferment of such persons if otherwise deferrable under any other provision of this Act. * * *

32 C.F.R. 1642.4 provides, in pertinent part:

> (a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

STATEMENT

On December 1, 1967, petitioner, a third-year graduate student with a Selective Service classification of

II–S, was declared to be a delinquent for failing to have his Registration Certificate and Notice of Classification in his personal possession,[1] as required by 32 C.F.R. 1617.1 and 1623.5. On the same day he was reclassified I–A by his local board, pursuant to 32 C.F.R. 1642.12 (Pet. App. 2a).[2]

In February 1968, petitioner brought this pre-induction suit to overturn his I–A classification and enjoin his induction into the Armed Forces (Pet. App. 2a). On April 9, 1968, the district court denied petitioner's motion for a temporary injunction on the ground that Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460(b)(3)) barred pre-induction judicial review of petitioner's reclassification. The court of appeals, relying on this Court's decisions in *Oestereich* v. *Selective Service Board No. 11*, 393 U.S. 233, and *Clark* v. *Gabriel*, 393 U.S. 256, affirmed.

---

[1] On November 8, 1967, petitioner notified his local board that he had surrendered his registration and classification cards at a rally on October 16, 1967, which protested against the Vietnam conflict (Pet. App. 1a–2a).

[2] 32 C.F.R. 1602.4 defines "delinquent" as a "person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law." 32 C.F.R. 1642.4(a) provides that "[w]henever a registrant has failed to perform any duty or duties required of him under the selective service law * * * the local board may declare him to be a delinquent." "Selective service law" is defined to include "title I of the Military Selective Service Act of 1967 [50 U.S.C. App. 451 *et seq.*] and all the rules and regulations issued thereunder" (32 C.F.R 1602.10).

ARGUMENT

This case presents substantially the same questions as does the petition in *Breen* v. *Selective Service Local Board No. 16*, pending on petition for a writ of certiorari, No. 1144, this Term. For the reasons set forth in our opposition to the *Breen* petition, we submit that the instant petition for a writ of certiorari should also be denied. Indeed, this case is a *fortiori* from *Breen* since, as petitioner concedes (Pet. 6), a wholly discretionary deferment of a graduate student under Section 6(h)(2), not the deferment of an undergraduate student as in *Breen*, is involved here (see Pet. App. 6a–9a).[3]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
MORTON HOLLANDER,
RALPH A. FINE,
Attorneys.

APRIL 1969.

[3] This is not to intimate that we agree with the implicit suggestion of the court below that, because of this point, the instant case and *Breen* might be distinguished (see Pet. App. 9a). Here the court expressly refrained from expressing a view on the applicability of Section 10(b)(3), as construed in *Oestereich*, to the situation of an undergraduate student deferment such as is involved in *Breen* (see Pet. App. 9a, n. 6).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 173

GEORGE M. CHAIKIN,
Petitioner

v.

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 66, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968.

No.

GEORGE M. CHAIKIN,
Petitioner

v.

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 66, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, George M. Chaikin, petitions that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Second Circuit (R. 50,[1] Appendix A, *infra*), affirming an order of the United States District Court for the Eastern District of New York vacating a preliminary injunction against the induction of petitioner into the armed forces and dismissing the complaint.

---

[1] The proceedings in the District Court are cited by document number, followed where appropriate by the page number of the document referred to. The proceedings in the Court of Appeals are cited by page number.

OPINION BELOW

The Court of Appeals wrote no opinion, and the District Court wrote none in vacating the preliminary injunction and dismissing the complaint. The findings and opinion of the District Court in granting the preliminary injunction (R. 7), not reported, are set forth in Appendix B, *infra*.

JURISDICTION

The order of the Court of Appeals (R. 50, Appendix A, *infra*) is dated and was entered March 12, 1969. Jurisdiction is conferred on the Court by 28 U.S.C. 1254.

QUESTIONS PRESENTED

Respondent, Selective Service System Local Board No. 66 (the "Board"), revoked petitioner's student deferment, reclassified him from II-S to I-A, and ordered him to report for induction as a delinquent because of his failure to maintain possession of his registration certificate. The questions presented are:

1. Whether section 10(b)(3) of the Military Selective Service Act of 1967 (the "Act"), 50 U.S.C. App. 460(b)(3), deprived the District Court of jurisdiction to enjoin petitioner's reclassification and induction and, if so, whether that section is constitutional.

2. Whether the actions of the Board in reclassifying petitioner and ordering him to report for induction, and the Selective Service System regulations pursuant to which these actions were taken, are authorized by the Act.

3. If question 2 is answered in the affirmative, whether the actions of the Board and the Selective Service System regulations which authorized them are constitutional.

STATUTES AND REGULATIONS INVOLVED

Section 6(h)(1) of the Act, 50 U.S.C. App. 456(h)(1) provides in part as follows:

> Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full time course of instruction at a college, university or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. * * * As used in this sub-section, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Section 10(b)(3) of the Act, 50 U.S.C. App. 460(b)(3), provides in part as follows:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction * * *

Section 12(b) of the Act, 50 U.S.C. App. 462(b) provides in part as follows:

> Any person * * * (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to

> the issuance, transfer, or possession of such [registration] certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. * * *

Section 1617.1 of the Selective Service System regulations, 32 C.F.R. 1617.1, provides in part as follows:

> Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board * * *

Section 1642.4(a) of the Selective Service System Regulations, 32 C.F.R. 1642.4(a), provides as follows:

> Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

STATEMENT OF THE CASE

This case involves the Selective Service System's delinquency reclassification procedures for failure to maintain possession of a registration certificate which were before the Court in *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233. *Oestereich* ruled that the delinquency reclassification and induction of a theological student, exempted from service by section 6(g) of the Act, is unauthorized by the Act and may be enjoined notwithstanding the limitations of section 10(b)(3) on pre-induction judicial review. The central issue which this case presents is whether *Oestereich* requires a similar result in the case of a full-time college student who has been deferred from service under section 6(h)(1). The same issue is presented by the

petition for certiorari in *Breen v. Selective Service Local Board No. 16*, No. 1144, this Term.[2]

The relevant facts, alleged in the complaint (R. 1), are admitted by the motion to dismiss (R. 13). Petitioner, a Selective Service registrant, was classified II-S in November, 1967, and has maintained the status prescribed for that classification ever since.[3] On March 28, 1968, he received a notice from the Board declaring him a delinquent for "failure to maintain your Selective Service Registration Certificate." Two weeks later, he received a notice from the Board reclassifying him I-A. On July 30, 1968, following the denial of an appeal from his reclassification, petitioner received a notice to report for induction on August 13, 1968. (R. 1-1, 2.)

On August 6, 1968, petitioner filed his complaint challenging the actions of the Board in reclassifying him and ordering him to report for induction, and the Selective Service System regulations under which the Board acted, as unauthorized by the Act and contrary to law. The complaint further alleged that the Service's delinquency regulations, as applied, violate the First Amendment, due process, the Sixth Amendment and the prohibition against bills of attainder. Petitioner sought an injunction against his induction and a declaratory judgment invalidating his reclassification. (R. 1-2, 3, 4.)[4]

On August 12, 1968, the District Court (Judd, J.) issued a preliminary injunction against petitioner's induction (R. 6). On February 17, 1969, following the decision of the Second Circuit in *Breen, supra*, that section 10(b)(3) bars

[2] In the words of the government (R. 14-7), *Breen* is "exactly like" the present case.

[3] At the time of the commencement of the action, petitioner had completed the fourth year of a five year course of study in architecture at Cooper Union (R. 2-3). He is now in the fifth year of that course.

[4] Jurisdiction was invoked under 28 U.S.C. 1331 and 2201, and the existence of the requisite jurisdictional amount was alleged (R. 1-1).

pre-induction judicial review in the circumstances of this case,[5] the District Court (Bartels, J.) granted the government's motion to vacate the preliminary injunction and dismiss the complaint for want of jurisdiction (R. 16).

On March 12, 1969, the Court of Appeals, after hearing argument on petitioner's motion for a stay of his induction pending appeal (R. 19), entered an order (1) affirming the order of the District Court on the authority of *Breen*, (2) staying the mandate pending petitioner's application for certiorari, and (3) staying petitioner's induction pending issuance of the mandate or the denial of certiorari in *Breen* (R. 50, Appendix A, *infra*).

REASONS FOR GRANTING THE WRIT

1. The decision below, and the decision in *Breen* on which the court below relied, are in conflict with this Court's decision in *Oestereich*. The rule of the latter, as stated in *Clark v. Gabriel*, 393 U.S. 256, 258, is that induction may be enjoined where "the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with [his] rights explicitly established by statute and not dependent on an act of judgment by the Board."

The circumstances of the present case satisfy all three of these criteria.

First, the right to deferment of a college student satisfactorily pursuing a full-time course of study is "explicitly established" by section 6(h)(1) of the Act, and may be restricted only upon a finding by the President that the needs of the armed forces so require. No such finding has been made. Second, since petitioner admittedly qualifies for deferment under section 6(h)(1) (*supra*, p. 5), his deferment is "not dependent on any act of judgment by the Board." Finally, the delinquency procedure by which

[5] The majority and dissenting opinions in *Breen*, not yet reported, appear at pp. 27-41 of the petition for certiorari in that case.

petitioner was reclassified has no more "statutory basis" in the case of a student deferment than it has in the case of a theological exemption. The Solicitor General conceded as much in his brief in *Oestereich*, No. 46, this Term, where he stated (p. 54, emphasis supplied):

> "It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction, regardless of its relationship to the individual's status as exempt *or deferred* or whatever."

Judge Feinberg, dissenting in *Breen*, was plainly correct, therefore, when he concluded that "this case is governed by the reasoning in *Oestereich*."

2. The decisions of the Second Circuit in the present case and in *Breen*, if not patently in conflict with *Oestereich*, present an important question which the Court should settle.

These two cases are the only ones in which a Court of Appeals has considered the application of *Oestereich* to student deferments under section 6(h)(1). Prior to *Oestereich*, two District Judges in the Second Circuit held that section 10(b)(3) of the Act does not preclude an injunction against the delinquency reclassification and induction of a registrant holding a student or an occupational deferment. *Kimball v. Selective Service Local Board No. 15*, 283 F. Supp. 606 (S.D.N.Y.); *Faulkner v. Clifford*, 289 F. Supp. 895 (E.D. N.Y.).[6] Another District Court, in a decision subsequent to *Oestereich*, relied on it as authority for enjoining the reclas-

[6] *Kimball*, citing the Solicitor General's confession of error in *Oestereich*, concluded (at 608) that any distinction "between an 'exemption' under § 456(g) and a 'deferment' under § 456(h) is one without legal significance." *Faulkner* held section 10(b)(3) unconstitutional as applied to a delinquency reclassification resulting from the exercise of First Amendment rights in surrendering a registration certificate. The government's appeal from that decision, *Clifford v. Faulkner*, No. 825, this Term, has been withdrawn.

sification and induction of a student entitled, under section 6(i)(2), to a deferment until the end of the academic year. *Armendaris v. Hershey*, ___ F. Supp. ___ (W.D. Tex., Feb. 5, 1969).

Furthermore, the Eighth Circuit, while refusing on the authority of *Oestereich* and *Clark v. Gabriel, supra*, to enjoin the delinquency reclassification of a graduate student who had been given a discretionary deferment under section 6(h)(2), declined the government's invitation to endorse the decision in *Breen*. *Kolden v. Selective Service System Local Board No. 4*, ___ F.2d ___ (Jan. 28, 1969). The court stated (at n. 6, emphasis in original): "Since the question is not before us we refrain from expressing an opinion as to whether § 10(b)(3) bars judicial review of a board's reclassification of *undergraduate* students from II-S to I-A for becoming delinquent."

The differences revealed by the foregoing decisions and by Judge Feinberg's vigorous dissent in *Breen* should be settled by the Court. That this was the view of the panels of the court below which decided *Breen* and the present case appears from their actions staying the induction of both petitioners pending application for certiorari.

3. Because *Oestereich* was disposed of on grounds of statutory construction, the Court did not reach questions with respect to the constitutionality of section 10(b)(3) and of the Selective Service System's delinquency procedures. If it were held that *Oestereich* does not control the present case, consideration of these questions would be required. They include the questions suggested by the majority opinion in *Oestereich* (at 237) arising from the lack of statutory standards governing delinquency reclassifications; the questions outlined in Justice Harlan's concurring opinion in *Oestereich* (at 243-44, n. 6), and the First Amendment question flowing from the use of delinquency reclassification as a reprisal for political protest. All of these questions are substantial and important, as the Solicitor General acknowledged in his brief in *Oestereich* (at 47-48, 49, 56, 62).

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

Order Below

This cause coming on to be heard on motion of plaintiff-appellant for an order staying the issuance by the defendant-appellee, Selective Service System Local Board No. 66, of an order requiring the plaintiff to report for induction into the armed forces pending the disposition of plaintiff's appeal from the order of the United States District Court for the Eastern District of New York made and entered February 17, 1969, vacating the preliminary injunction theretofore issued and dismissing the complaint herein; and the Court having heard the arguments of counsel, and being fully advised in the premises, it is

ORDERED, that plaintiff's appeal from the order of the District Court of February 17, 1969, be and it is hereby docketed in this Court;

FURTHER ORDERED, that the aforesaid order of the District Court of February 17, 1969, be and it is hereby affirmed on the authority of the decision of this Court dated January 10, 1969, in *Breen v. Selective Service Local Board No. 16*, No. 32345;

FURTHER ORDERED, that the issuance of the mandate herein be and it is hereby stayed pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure pending application by plaintiff for certiorari;

FURTHER ORDERED, that the issuance by the defendant, Selective Service System Local Board No. 66 of an order requiring plaintiff to report for induction into the armed forces be and it is hereby stayed pending the issuance of the mandate herein; provided that the stay granted by this paragraph shall terminate in the event of the denial by the

Supreme Court of the United States of a petition for certiorari in *Breen v. Selective Service Local Board No. 16.*

Dated: New York, N.Y.
March 12, 1969.

/s/ J. Edward Lumbard

/s/ J. Joseph Smith

/s/ Edward C. McLean
Judges, U.S. Court of Appeals

APPENDIX B

Findings of Fact and Opinion of District Court Granting Preliminary Injunction

JUDD, J.

1. Plaintiff George Chaikin was duly registered under the Universal Military Training and Service Act and classified "II-S until October, 1968" in November, 1967.

2. Plaintiff is a student of architecture at Cooper Union where he has completed the fourth year of a five-year course of study. Plaintiff was married June 11, 1966.

3. Plaintiff Chaikin was registered with Selective Service Board No. 66 of Flushing, New York.

4. On March 26, 1968, the Board declared plaintiff delinquent for "failure to maintain your Selective Service Registration Certificate".

5. On April 12, 1968, the Board reclassified plaintiff from II-S to I-A.

6. On or about May 9, 1968 plaintiff filed a written notice of appeal from this reclassification. He was notified on July 17, 1968 that his appeal had been unanimously rejected.

7. On July 30, 1968, plaintiff received an order from the Board ordering him to report for induction on August 13, 1968.

8. Plaintiff contends that the Selective Service Regulations concerning delinquency (32 C.F.R. 1642.1 *et seq.*) are contrary to law, and violate his First Amendment rights. He now moves for an order enjoining the defendant Board from directing him to report for induction into the Armed Forces.

OPINION

This case, like *Brother Woods et al v. Selective Service Local Board No. 3* (68 C 350), raises questions of the validity of the delinquency declaration and reclassification procedures of local Selective Service Boards.

The opinion in the *Woods* case, decided by this Court August 12, 1968, points out that the issues in that case, as in this one, are similar to those presently before the United States Supreme Court in *Oestereich v. Selective Service Local Board No. 11* (*Certiorari* granted May 20, 1968); and that courts have assumed jurisdiction to enjoin an induction which is contrary to law, in spite of the provisions of the Section 10(b)(3) of the Universal Military Training and Service Act, e.g., *Kimball v. Selective Service Local Board No. 15*, 283 F. Supp. 606 (S.D.N.Y. 1968).

Issues will be presented at the trial as to the effect of the registrant's having reached age twenty-four and the effect of his marriage on the order of his induction.

Since the induction was imminent, a preliminary injunction was signed on August 12, 1968, subject to the filing of the foregoing findings of fact and opinion.

The defendants may, if they wish, move to vacate the injunction upon the Supreme Court decision in the *Oestereich* case.

Dated: Brooklyn, New York
August 13, 1968

/s/ Orin G. Judd
U. S. D. J.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

GEORGE M. CHAIKIN, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 66, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1198

GEORGE M. CHAIKIN, PETITIONER

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 66, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 12-13) and the order of affirmance by the court of appeals (Pet. 10-11) are not reported.

JURISDICTION

The order of the court of appeals was entered on March 12, 1969. The petition for a writ of certiorari

was filed on March 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460(b)(3)) prohibits pre-induction judicial review of a I-A delinquency reclassification of a student formerly classified II-S.

STATUTES AND REGULATIONS INVOLVED

Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460(b)(3)) provides, in pertinent part:

* * * * *

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of 50 U.S.C. App.], after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Section 6(h)(1) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 456(h)(1)) provides:

Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section, after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or

deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

32 C.F.R. 1642.4 provides, in pertinent part:

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

STATEMENT

On November 17, 1967, petitioner, a full-time undergraduate student of architecture at Cooper Union, was granted a II-S deferment from military service. On March 28, 1968, he received a notice declaring him delinquent for failing to keep his Selective Service registration certificate in his personal possession, as required by 32 C.F.R. 1617.1. On April 12, 1968,

32 C.F.R. 1602.7 defines "delinquent" as a person required to be registered under the selective service law, who fails or neglects to perform any duty required of him under the provisions of the selective service law. 32 C.F.R. 1642.4(a) provides that, "Whenever a registrant has failed to perform any

petitioner received a notice that he had been reclassified from II-S to I-A by his local board, pursuant to 32 C.F.R. 1642.12. He was then ordered to report on August 13, 1968, for induction into the Armed Forces.

Prior to the induction date, in August 1968, petitioner brought this pre-induction suit to have his induction enjoined and II-S classification reinstated. On August 12, 1968, the district court preliminarily enjoined petitioner's induction pending further consideration of the case (see Pet. 12-13). Subsequently, the Second Circuit, in *Breen* v. *Selective Service Local Board No. 16*, pending on petition for a writ of certiorari, No. 1141, this Term, held that Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460(b)(3)) bars pre-induction judicial review of delinquency reclassifications of undergraduate students for violation of Selective Service regulations. Accordingly, on February 17, 1969, the district court vacated the preliminary injunction and dismissed the complaint for lack of jurisdiction. On March 12, 1969, the court of appeals affirmed summarily on the authority of *Breen*.

ARGUMENT

The instant case presents precisely the same issues as those raised by petitioner in the *Breen* case, and

duties required of him under the selective service law * * * the local board may declare him to be a delinquent." "Selective service law" is defined to include "title I of the Military Selective Service Act of 1967 [50 U.S.C. App. §§ 451 et seq.] and all the rules and regulations issued thereunder." (32 C.F.R. 1602.10).

also closely parallels *Kolden* v. *Selective Service Board No. 4*, pending on petition for a writ of certiorari, No. 1175, this Term. For the reasons set forth in our opposition to the *Breen* petition, we submit that the instant petition for a writ of certiorari should also be denied.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD
Solicitor General

WILLIAM D. RUCKELSHAUS
Assistant Attorney General

MORTON HOLLANDER
ROBERT M. HUBER
Attorneys

APRIL 1969

[1] In *Breen* the Second Circuit held that an undergraduate student is not entitled to pre-induction judicial review of his reclassification. The Eighth Circuit in *Kolden* reached the same conclusion with respect to graduate students.

MAY 27 1969

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 169

LAWRENCE R. FAULKNER,

Petitioner

v.

CLARK CLIFFORD, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STANLEY FAULKNER
ERIC W. SCHMIDT
9 East 40th Street
New York, N.Y. 10016
Attorneys for Petitioner

OPINIONS BELOW

The Court of Appeals wrote no opinion. The opinion of the District Court, unreported, vacating the preliminary injunction and dismissing the complaint, appears in Appendix B, *infra* (R. 26).

The opinion of the District Court (Travia, J.) granting the preliminary injunction is reported at 289 F. Supp. 895.

JURISDICTION

The order of the Court of Appeals (R. 88, Appendix A, *infra*) is dated May 1, 1969, and was entered May 1, 1969. Jurisdiction is conferred on the Court by 28 U.S.C. 1254.

QUESTIONS PRESENTED

Respondent, Selective Service System Local Board No. 3 (the "Board"), declined to restore to petitioner his II-S student deferment, classified him 1-A and ordered him to report for induction as a delinquent because of his failure to maintain possession of his registration certificate. The questions presented are:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 (50 App. U.S.C. Sec. 460(b)(3)) preclude judicial review of petitioner's punitive classification and order to report for induction?

2. Does the declaration of delinquency, punitive classification and induction of petitioner for failure to have his Registration Certification in his personal possession, violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, the Selective Service Regulations and National Selective Service Memorandum?

3. Does Selective Service Regulation 1617.1 (32 C.F.R. Sec. 1617.1), as construed and applied in this case, and Selective Service Regulation 1642.4 (32 C.F.R. Sec. 1642.4) on its face, violate the First Amendment?

STATUTES AND REGULATIONS INVOLVED

Section 10(b)(3), Military Selective Service Act of 1967; 50 App. U.S.C. Section 460(b)(3) is set out in Appendix C, *infra*, p. 11.

Selective Service Regulation § 1622.26(b); 32 C.F.R. § 1622.26 is set out in Appendix D, *infra*, p. 12. (Executive Order 11360 (July 4, 1967)); 32 F.R. 9787).

Selective Service Regulation § 1642.4; 32 C.F.R. § 1642.4 is set out in Appendix E, *infra*, p. 13.

Local Board Memorandum No. 83 (October 6, 1967) issued under Selective Service System Regulations §§ 1622.25 and 1622.26(b) is set out in Appendix F, *infra*, p. 14.

Local Board Memorandum No. 95 (April 19, 1968) issued under Selective Service System Regulations §§ 1622.20, 1622.21, 1622.22, 1622.23, 1622.23a, 1622.24, 1622.26, is set out in Appendix G, *infra*, p. 15.

STATEMENT OF THE CASE

This case once again brings before this Court the delinquency reclassification procedure adopted by a selective service system board for failure by a registrant to maintain in his possession his registration certificate. *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233. *Oestereich* ruled that the delinquency and reclassification of one exempt from military service was not authorized by the Act and the court may enjoin induction despite the restriction placed upon the court by Section 10(b)(3) limiting pre-induction review.

At all the times relevant hereto petitioner was a second year graduate student at the University of the State of New York at Buffalo. During his first year from September 1965 to December 1966 he was classified II-S. For the following year he was classified II-A because he was engaged in work in the national interest and welfare. On September 26, 1967, petitioner returned to the University for his second

year of graduate studies leading to a Master's Degree and a Ph.D. program and requested a return of his statutory student classification of II-S.[2] Certification by the school is in petitioner's file and was a government exhibit at the hearing for a preliminary injunction. It is annexed hereto (Appendix H, *infra*, p. 17).

No action was taken on petitioner's request for a return of his II-S classification until October 24, 1967. On that date the Board was directed by respondent Col. John W. Brokaw, Deputy State Director, Selective Service System of the State of New York, to declare petitioner a delinquent for non-possession of his registration certificate. The letter of Col. Brokaw appears in Appendix I, *infra*, p. 18 (Gov't Ex. 24 at hearing for preliminary injunction). The Board summarily notified petitioner that he was a deliquent (Appendix J, *infra*, p. 19) and reclassified 1-A.

Following the denial of his appeal and after certain intervening circumstances petitioner was ordered to report for induction on August 19, 1968.

On August 12, 1968, petitioner commenced an action in the United States Court for the Eastern District of New York for an injunction against induction and a declaratory judgment invalidating his reclassification to 1-A. (R. 1)[3]

On September 9, 1968, after a hearing, the District Court (Travia, J.) issued a preliminary injunction against petition-

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[2] Local Board Memorandum No. 83 from National Headquarters, Selective Service System, qualifies a graduate student for a II-S classification who enters his second year in the fall of 1967 after a previous classification of II-A (Appendix F, *infra*, p. 14). Petitioner's request was noted by the Board, Government Exhibit A, p. 40 of hearing for preliminary injunction.

[3] Jurisdiction was invoked under 28 U.S.C. 1331, Universal Military Training and Service Act of 1948 as amended, now entitled Military Selective Service Act of 1967 (50 U.S.C. App. § 451 et seq.), §§ 1 of Articles I, II and III of the Constitution and 28 U.S.C. §§ 1361, 2201, 2282 and 2284; and the existence of the requisite jurisdictional amount was alleges (R. 1)

er's induction (289 F.Supp. 895). The government took a direct appeal to this Court from the order of Judge Travia. The appeal was withdrawn after petitioner filed his Motion to Affirm with this Court. (___ U.S. ___, 89 S.Ct. 676, January 17, 1969).

Respondents, by notice of motion dated February 4, 1969, moved the District Court for an order dismissing the complaint and vacating the preliminary injunction upon the authority of *Oestereich v. Selective Service System Local Board No. 11, supra; Clark v. Gabriel*, 393 U.S. 256; and *Breen v. Selective Service Local Board No. 16*, 406 F.2d 636 (C.A. 2, 1969).[4] The District Court (Bartels, J., granted the respondents' motion to vacate the preliminary injunction and dismiss the complaint (R. 26).

On May 1, 1969, the Court of Appeals, after hearing argument on petitioner's motion for a stay of his induction pending appeal (R. 88), entered an order affirming the judgment of the District Court on the authority of *Breen v. Selective Service, supra;* and staying the order of induction and mandate provided petitioner filed a petition for certiorari within thirty (30) days.

REASONS FOR GRANTING THE WRIT

1. The decision below and the decision in *Breen* upon which the lower court relied are in conflict with *Oestereich*. The decision by this Court in *Oestereich* is dispositive of the legal question in the instant case.

The lower court (Travia, J.) in granting the preliminary injunction was of the opinion that the legal questions in this case might be determined in *Oestereich*. Although *Oestereich* turned upon the narrow point of the statutory exemption from military training and service of a ministerial student, it definitively found that delinquency could not be employed by a local board to impose punishment for "activi-

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[4]Certiorari was granted April 28, 1969.

ties or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner."

Petitioner in words and deeds acted the same as *Oestereich*. He returned his registration card as an expression of opposition to the war in Vietnam. Petitioner under the law was at the time of his action entitled to be classified II-S as a graduate student.[5] The record is clear that his *punishment* was to be put in a delinquent status and classified 1-A because he exercised his First Amendment right of free speech. The direction to the Board by respondent Brokaw in no uncertain terms directed the local board to process petitioner as delinquent because he acted "against the draft".[6]

In *Clark v. Gabriel, supra*, this Court was not confronted with a First Amendment question. The lower court was reversed and the case was remanded for issuance of an order dissolving the preliminary injunction and a dismissal of the action. However, Mr. Justice Douglas, in a concurring opinion, in no uncertain terms held that if *Gabriel* had been reclassified "because he made a speech, unpopular with the Board" he would take a different view. The Supreme Court frequently struck down statute and ordinances giving to inappropriate bodies the power to enforce their conclusions on the delicate and sensitive question as to whether particular activity is entitled to First Amendment protection.[7]

Unlike *Gabriel*, in which this Court held that in the case of a registrant claiming a conscientious objector classification the Board has the power to determine the facts and

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[5] 32 C.F.R. § 1622.26(b); Executive Order 11360 (July 4, 1967), 32 F.R. 9787; Local Board Memorandum No. 83 (Appendix F, p. 14).

[6] Appendix I, p. 18.

[7] See, e.g. *Kuntz v. New York*, 340 U.S. 290 (1951); *Bantam v. Sullivan*, 372 U.S. 58 (1963); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

exercise judgment, in this case such exercise of judgment does not prevail. The record will disclose that petitioner was in his second year of post-baccalaureate study without interruption on October 1, 1967,[8] as certified by his school and therefore entitled to a II-S classification.[9] In this case as in *Oestereich* the Board had merely the function of determining whether petitioner was a second year graduate student on October 1, 1967, by certification of his school.

The delinquency procedure by which petitioner was reclassified has no more "statutory basis" in the case of a student deferment than it has in the case of a theological exemption. The Solicitor General conceded as much in his brief in *Oestereich*, where he stated (p. 54, emphasis supplied):

> It is difficult to believe that Congress intended the local boards to have unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction, regardless of its relationship to the individual's status as exempt or *deferred* or whatever.

Mr. Justice Stewart in his dissenting opinion in *Oestereich* was of the thought that the Court's holding as to statutory "exemptions would also apply to full time college students."[10]

Judge Feinberg, dissenting in *Breen*, was plainly correct, therefore, when he concluded that "this case is governed by the reasoning in *Oestereich*."

In view of the fact that *Oestereich* was decided on grounds of statutory construction, the Court did not reach questions with respect to the constitutionality of Section 10(b)(3) and of the Selective Service System's delinquency procedures. If the Court should hold that *Oestereich* does not control

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[8]The one year that petitioner had a II-A classification is not considered "interruption" in studies. (n. 2)

[9]32 C.F.R. § 1622.26(b).

[10]Dissent of Justice Stewart, p. 4, note 9.

the present case, consideration of these questions would be required. They include the questions suggested by the majority opinion in *Oestereich* (p. 237) arising from the lack of statutory standards governing delinquency reclassifications; the questions outlined in Justice Harlan's concurring opinion in *Oestereich* (p. 233-44, n.6) and the First Amendment question flowing from the use of delinquency reclassification as a reprisal for political protest. All of these questions are substantial and important, as the Solicitor General acknowledged in his brief in *Oestereich* (p. 47-49, 56, 62).[11]

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

STANLEY FAULKNER
ERIC W. SCHMIDT
Attorneys for Petitioner

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[11]These questions were raised in this case in the Jurisdictional Statement filed by the Solicitor General in its appeal to this Court on October 7, 1968, from the decision of Judge Travia granting the preliminary injunction holding Section 10(b)(3) unconstitutional as applied and in petitioner's Motion to Affirm in this Court. The appeal by the Government was withdrawn and dismissed on January 17, 1969 (___ U.S. ___, 89 S.Ct. 676).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Lawrence R. Faulkner,
Plaintiff-Appellant,
v.

Clark Clifford, as Secretary
of Defense, et al.,
Defendants-Appellees.

The judgment of the district court is affirmed. Breen v. Selective Service, 406 F.2d 636 (1969).

The order of induction and the mandate of this court are stayed provided that the appellant files a petition for certiorari with the Clerk of the Supreme Court of the United States within 30 days of the date of this order. Rule 41(b), Federal Rules of Appellate Procedure.

J. Edward Lumbard
Robert P. Anderson
Circuit Judges

Inzer B. Wyatt
District Judge

May 1, 1969

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LAWRENCE R. FAULKNER,
Plaintiff,

-against-

CLARK CLIFFORD, as Secretary of Defense, STANLEY RESOR, as Secretary of the Army, RAMSEY CLARK, as Attorney General of the United States, LEWIS B. HERSEY, as Director of Selective Service of the United States, COL. JOHN BROKAW, as Deputy State Director, Selective Service System of the State of New York, and CHARLES E. ARTALE, ROBERT J. GLASSER, THOMAS D. KEARNEY, BERNARD LAVIN and JOSEPH NOONAN, as members of Selective Service Board No. 3,
Defendants.

68-C-808

April 9, 1968

MEMORANDUM

BARTELS, D.J.

On September 9, 1968, Judge Travia granted a preliminary injunction enjoining the induction of the plaintiff into the Armed Forces of the United States (*Faulkner v. Clifford*, 289 F.Supp. 895 (E.D.N.Y. 1968)) with leave to the defendants to move to vacate the same after the decision upon the appeal then pending to the United States Supreme Court in *Oestereich v. Selective Service System Local Board No. 11*, 280 F.Supp. 78 (D. Wyoming, 1968), *affirmed*, 390 F.2d 100 (10th Cir., 1968), *cert. granted*, 391 U.S. 912 (1968), which decision has since been rendered reversing the Court of Appeals (393 U.S. 233 (1968)). The decision failed to hold unconstitutional Section 10(b)(3) of the Mili-

tary Selective Service Act of 1967. Subsequently, the Court of Appeals in this Circuit in *Breen v. Selective Service Local Board No. 16*, No. 32345, Jan. 10, 1969, held upon facts similar to this case that this Court under the above Section had no jurisdiction to hear this pre-induction complaint. The Government, therefore, moves to vacate the injunction and to dismiss the complaint.

Accordingly, the motion to vacate the injunction and to dismiss the complaint is granted. SO ORDERED.

John R. Bartel
United States District Judge

APPENDIX C

Section 10(b)(3) of the Act, 50 U.S.C. App. 460(b)(3), provides in part as follows:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction.

APPENDIX D

1622.26 Class II-S: Registrant Deferred Because of Activity in Graduate Study.—

(b) Any registrant who is entering his second or subsequent year of post-baccalaureate study without interruption on October 1, 1967, may be placed in Class II-S if his school certifies that he is satisfactorily pursuing a full-time course of instruction leading to his degree; but such registrant shall not be deferred for a course of study leading to a master's degree or the equivalent for more than one additional year, or for a course of studying leading to a doctoral or professional degree or the equivalent (or combination of master's and doctoral degrees) for more than a total of five years, inclusive of the years already used in such course of study, or for one additional year, whichever is greater. Any registrant enrolled for his first year of post-baccalaureate study in a graduate school or a professional school on October 1, 1967, or accepted for admission involving enrolled status on October 1, 1967, may be placed in Class II-S if he has entered the first class commencing after the date he completed the requirements for admission and shall be deferred for one academic year only, or until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier.

APPENDIX E

1642.4 Declaration of Delinquency Status and Removal Therefrom.—(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form 100) and shall complete a Delinquency Notice (SSS Form 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form 101).

APPENDIX F

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM

WASHINGTON, D.C. 20435

SSS Reg.
1622.25
1622.26(b)

LOCAL BOARD MEMORANDUM NO. 83
ISSUED: OCTOBER 6, 1967

SUBJECT: ELIGIBILITY OF STUDENTS FOR CLASS II-S AFTER AN INTERRUPTION IN STUDIES

1. A registrant who enters or re-enters graduate or professional school in the fall of 1967, and who has been classified in Class II–A or Class IV–D since his completion of the requirements for admission or since his last full-time attendance in graduate or professional school, shall not be considered to have failed to meet the requirements of section 1622.26(b) solely because of his absence from school while so classified.

2. A registrant who re-enters a college, university, or similar institution of learning as an undergraduate student, and who has been classified in Class II–A or Class IV–D since his last full-time attendance at such an institution, shall not be considered to have failed to meet the requirements of section 1622.25 solely because of his absence from school while so classified.

Lewis B. Hershey.

Director.

APPENDIX G

LOCAL BOARD MEMORANDUM NO. 95

ISSUED: APRIL 19, 1968

Law:
Sec. 4(g)
Sec. 6(h)(2)

SSS Reg.
1622.20 1622.23a
1622.21 1622.24
1622.22 1622.26
1622.23

SUBJECT: ADVICE OF NATIONAL SECURITY COUNCIL WITH RESPECT TO OCCUPATIONAL AND GRADUATE STUDENT DEFERMENTS

1. Under advice received February 16, 1968, from the National Security Council with respect to occupational deferments, the lists of essential activities and critical occupations are suspended, leaving each local board with discretion to grant, in individual cases, occupational deferments based on a showing of essential community need.

2. With respect to graduate school deferments, the National Security Council advises that it is not essential for the maintenance of the national health, safety, or interest to provide student deferments for graduate study in fields other than medicine, dentistry, and allied medical specialties; except that this recommendation does not affect existing regulations governing deferment for graduate students who entered their second or subsequent year of graduate study in the fall of 1967. It does affect students graduating from college this year, as well as those who entered the first year of graduate school last fall. I concur in the recommendation made by the Council.

3. For the information and guidance of all selective service personnel, the full text of the memorandum of advice for the National Security Council is attached to this Local Board Memorandum and is made a part of it.

(TM 132)

Lewis B. Hershey.

Attachment

Director.

Budget Bureau No. 33-R-202.4

SELECTIVE SERVICE SYSTEM

GRADUATE OR PROFESSIONAL COLLEGE STUDENT CERTIFICATE

Date October 19, 1967

1. Name and Address of Student

LAWRENCE R. FAULKNER
1200 5th Ave
NEW YORK, N.Y.

Selective Service No.

31	3	43	2171

PART I – GRADUATE STUDENTS

2 (a). The student identified above has been accepted for admission to graduate school for a full-time course of instruction leading to a graduate degree, in the class commencing _____ and being the first class commencing after he completed the requirements for admission.

2 (b). The student identified above has entered upon a full-time course of instruction as a candidate for a graduate degree, which commenced on Sept. 1965, and currently is meeting degree requirements, and is expected to attain the degree of Ph.D. in History, on or about 1972.

PART II - PROFESSIONAL STUDENTS

3 (a). The student identified above has been accepted for admission to _____ school in the first year class commencing _____ and being the first class commencing after he completed requirements for admission.

3 (b). The student identified above has entered upon the _____ year of his professional studies, and is satisfactorily pursuing a full-time course of study leading to graduation with the degree of _____ on or about _____.

PART III - GENERAL

4. The student identified above is (check one)

☐ No longer enrolled full time
☐ Not eligible to continue
☐ Graduated

5. Remarks

This form is to be prepared by authorized representatives of colleges and universities who are certifying the scholastic status of students to selective service local boards. The form is to be completed by filling in all appropriate blank spaces and placing "X" in appropriate boxes. Submit the original of this form to the local board with which the student is registered, at the address shown in Item 6. A copy may be furnished to the registrant and a copy retained. Submission of this form does not constitute a request for deferment. Authentication of information on this form may be by any means evidencing that a responsible official of the institution has verified its preparation.

A graduate college student, for the purposes of classification by a local board, is defined to be a student who has been accepted for, or has entered upon a full-time course of instruction at a graduate school as a candidate for a graduate degree, including, in addition to course work, teaching and research assistance, preparation for foreign language and other required examinations, and supervised work on graduate theses.

A professional college student, for the purposes of classification by a local board, is defined to be a full-time student who has been accepted for admission by, or who is in attendance at a professional school, including law, medicine, dentistry, veterinary medicine, osteopathy, optometry, pharmacy, chiropractic, or chiropody. A student at the preprofessional level of instruction preparing to become a student in a professional school is considered to be an undergraduate student.

6. Address of Local Board

Local Board #3
161 Great Neck Rd.
Great Neck, N.Y 11021

7. Authentication

Rosemary Cione, Secretary, Graduate School
State University of New York at Buffalo

Rosemary Cione

Name and address of Institution

SSS Form 102 (Revised 6-17-66) (Previous printings are obsolete)

APPENDIX H

SELECTIVE SERVICE SYSTEM
NEW YORK STATE HEADQUARTERS
OLD POST OFFICE BUILDING
ALBANY 12207

REFER TO FILE:

October 25, 1967 3-10.24-02

Mr. Fred W. Kelly
Chairman, Local Board No. 3
161 Great Neck Road
Great Neck, New York 11021

Subject: FAULKNER, Lawrence Ralph
SS No. : 30-3-43-2171

Dear Mr. Kelly:

We are enclosing a Registration Certificate (SSS Form 2) for a registrant of your Local Board which was turned into the Buffalo Selective Service Boards on October 18th, 1967 as a part of a demonstration against the draft.

In view of the above the registrant should be processed as a delinquent. The following notice should be included on the Delinquency Notice (SSS Form 304), Failure to have a Registration Certificate (SSS Form 2) in your possession."

Should the registrant request a duplicate Registration Certificate the delinquency may then be removed.

By The State Director

JOHN W. BROKAW
Colonel, AGC
Deputy State Director
Operations Officer

Appeal Board-Eastern Dist.
134 Jackson Street

JAN 26 1968

Hompstead
New York 11550

Enclosure

DELINQUENCY NOTICE

Oct. 24, 1967
(Date Declared Delinquent)

Oct 25, 1967
(Date of Mailing)

(Local Board Stamp)

SELECTIVE SERVICE NO			
30	3	43	2171

To LAWRENCE R FAULKNER
(First) (Middle) (Last)

Address 1200 5th Ave.
(Street and Number or RFD Route)

NEW YORK NY
(City, Town, or Village) (County) (State) (ZIP Code)

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service law:

Failure to have a Registration Certificate (SSS Form #2) in your possession.

2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000, or by both such fine and imprisonment. You may be classified in class 1-A as a delinquent and ordered to report for induction.

already

Appeal Board-Eastern Dist.
134 Jackson Street
Hompstead
York 11550

JAN 26 1968

(Member or Clerk of Local Board)

INSTRUCTIONS

A Delinquency Notice (SSS Form 301) shall be prepared by the Local Board whenever it declares the registrant to be a delinquent because of his failure to perform any duty or duties required of him other than failure to comply with an Order to Report for Induction (SSS Form 252), or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153). This notice shall be prepared in triplicate, and the specific duty or duties which the registrant has failed to perform shall be described in detail in the space provided. The Local Board shall (a) mail the original to the registrant at his last known address, (b) file a copy in the registrant's Cover Sheet (SSS Form 101), and (c) mail a copy to the State Director of Selective Service.

2297 13

SSS Form 304 (5-25-65)

U.S. GOVERNMENT PRINTING OFFICE 1965 O—785-758

APPENDIX J

[redacted]

[redacted]

LAWRENCE R. TARLTON, PETITIONER

v.

MELVIN R. LAIRD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENTS

ERWIN N. GRISWOLD,
Solicitor General,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

MORTON HOLLANDER,
RALPH S. SPRITZER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1448

LAWRENCE R. FAULKNER, PETITIONER

v.

MELVIN R. LAIRD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENTS

Petitioner, who was classified II-A (occupational deferment), entered his second year of graduate study in September 1967, and sought reinstatement to his previous classification of II-S (student deferment) (Pet. 3-4). On October 24, 1967, he was declared delinquent by his local Selective Service board for failing to have his Registration Certificate in his personal possession as required by 32 C.F.R. 1617.1 (Pet. 4).[1] He was reclassified I-A the same day (*ibid.*).

---

[1] Petitioner turned in his draft card as a protest against the war in Vietnam.

On August 12, 1968, petitioner brought this pre-induction suit to overturn his I-A classification and enjoin his impending induction (Pet. 4). On September 9, 1968, the district court issued a preliminary injunction (289 F. Supp. 895) (Pet. 5). Respondents took a direct appeal to this Court, which was withdrawn subsequent to this Court's decisions in *Oestereich* v. *Selective Service Local Bd. No. 11*, 393 U.S. 233, and *Clark* v. *Gabriel*, 393 U.S. 256, so as to permit reconsideration of the case by the district court in light of those decisions (see 393 U.S. 1046). Thereafter, the Court of Appeals for the Second Circuit decided the similar case of *Breen* v. *Selective Service Local Board No. 16*, 406 F. 2d 636.[2] On April 9, 1969, the district court, relying on *Breen*, vacated the preliminary injunction and dismissed the complaint (Pet. 10-11). The court of appeals affirmed, but stayed petitioner's induction on the condition that he file a petition for a writ of certiorari prior to May 31, 1969 (Pet. 9).

Petitioner maintains that Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460 (b)(3)) should be construed, as in *Oestereich*, so as not to prohibit pre-induction judicial review of a delinquency reclassification in circumstances such as those presented here. He also asserts that his reclassification and ordered induction were punitive in nature, and in violation, *inter alia*, of the First and Fifth Amendment. Accordingly, the instant case presents substantially the

---

[2] On April 28, 1969, this Court granted certiorari in the *Breen* case (No. 1144, 1968 Term).

same questions as are involved in *Breen*. Since the court below relied entirely upon *Breen* in affirming, and since certiorari has been granted by this Court in that case, it would seem appropriate to defer consideration of this petition until after *Breen* has been decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

MORTON HOLLANDER,
RALPH A. FINE,
Attorneys.

JUNE 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 183

DAVID OSHER,

Petitioner,

v.

SELECTIVE SERVICE LOCAL BOARD NO. 6, VALLEY STREAM, NEW YORK; COLONEL WILLIAM H. BOUGHTON, DIRECTOR, NEW YORK STATE HEADQUARTERS SELECTIVE SERVICE SYSTEM,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MELVIN L. WULF
PAUL CHEVIGNY
156 Fifth Avenue
New York, New York 10010
Attorneys for Petitioner

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In the

Supreme Court of the United States

October Term, 1968

No. .....

David Osher,

Petitioner,

—v.—

Selective Service Local Board No. 6, Valley Stream, New York; Colonel William H. Bogaton, Director, New York State Headquarters Selective Service System,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner David Osher prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on May 1, 1969.

Opinions Below

The decision of the Court of Appeals, summarily affirming a denial of a preliminary injunction and granting a stay of induction pending appeal, is unreported, and appears on the Appendix, *infra*, p. 9. The decisions of the

District Court for the Eastern District of New York, initially granting a preliminary injunction, and then refusing to extend the said injunction, are unreported, and appear in the Appendix, *infra* p. 11 and p. 14 respectively.*

Jurisdiction

The judgment of the Court of Appeals was entered on May 1, 1969. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

Questions Presented

Petitioner is a graduate student in history at Columbia University and has been since 1965. He was deferred from training and service in the armed forces under Section 6(h)(2) of the Military Selective Service Act of 1967 and 32 CFR §1622.26(b). Upon returning his Selective Service Registration Certificate to the U.S. Government as part of a protest against the war in Vietnam, petitioner was on March 19, 1968, declared delinquent and reclassified 1-A, and subsequently ordered to report for induction. The case thus presents the same issues of law and fact as *Koldin v. Selective Service Local Board No. 4, Beltrami County, Minnesota*, No. 1175, petition for a writ of certiorari filed, 37 U.S.L.W. 3337 (March 19, 1969). Those questions are:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U.S.C. 460(b)(3)] preclude

* The case below was styled *Waigls et al. v. Selective Service Local Board No. , et al.* The title is changed here because only petitioner, one of the plaintiffs below, is filing this petition for certiorari.

judicial review of petitioner's punitive reclassification and order to report for induction?

2. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Registration Certificate in his personal possession, violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

3. Do Selective Service Regulations 1617.1 and 1623.5, as construed and applied in this case, and Selective Service Regulation 1642.4 on its face, violate the First Amendment?

Statutes and Regulations Involved

Sec. 10(b)(3), Military Selective Service Act of 1967; 50 App. U.S.C. Sec. 560(b)(3) is set out in the Appendix, *infra*, p. 16.

Sec. 6(h)(2), Military Selective Service of 1967; 50 App. U.S.C. Sec. 546(h)(2), is set out in the Appendix, *infra*, p. 16.

Selective Service Regulation 1622.26; 32 C.F.R. Section 1622.26, is set out in the Appendix, *infra*, p. 18.

Selective Service Regulation 1642.4; 32 C.F.R. Section 1642.4, is set out in the Appendix, *infra*, p. 19.

Selective Service Regulation 1617.1; 32 C.F.R. Section 1617.1, is set out in the Appendix, *infra*, p. 19.

Selective Service Regulation 1623.5; 32 C.F.R. Section 1623.5, is set out in the Appendix, *infra*, p. 20.

Statement of the Case

Petitioner, on January 11, 1968, and at all pertinent times thereafter was a graduate student at Columbia University. He had been such since 1965, and was classified II-S. On January 11, 1968, at a news conference at the Overseas Press Club in New York, petitioner surrendered his Selective Service Registration Certificate, with the support of noted public figures, as a protest against the war in Vietnam (affidavit in support of order to show cause in District Court, R. 23*). His local draft board then declared him delinquent and reclassified him 1-A by a notice dated March 19, 1969, by reason of "failure to have registration card in your possession." On April 15, 1968, the present action was commenced on behalf of petitioner and other plaintiffs who do not now seek review here in the Eastern District of New York. That action alleged that the delinquency and reclassification of the plaintiffs was contrary to the Selective Service law and regulations, that it denied them due process of law and penalized the assertion of rights under the First Amendment.

Petitioner received a notice to report for induction on November 4, 1968. That induction was preliminarily enjoined on November 4, 1968, until ten days following the decision of this Court in *Oestereich v. Selective Service System*, which was then pending (Appendix, *infra*, p. 12). After the decision in that case 21 L.Ed. 2d 402 (December 16, 1968), the District Court refused to extend the injunction (Appendix, *infra*, p. 15) and an appeal was taken

* "R." refers to the numbered documents of the Record in the Court below, part of the Record filed with the Clerk of the Court.

to the Court of Appeals for the Second Circuit. The induction order of petitioner Osher was renewed for April 23, 1969 (Order to show cause for stay pending appeal, R. 36), he sought a stay pending appeal, and the respondents made a motion in the Court of Appeals for summary affirmance upon the authority of *Breen* v. *Selective Service System*, No. 1144, cert. granted 37 U.S.L.W. 3407 (April 28, 1969). The motion for summary affirmance and the stay were both granted by the Court of Appeals on May 1, 1969 (Appendix, *infra*, p. 9) and a writ of certiorari is sought to review that decision.

Reasons for Granting the Writ

1. Certiorari should be granted because the decision below conflicts with this Court's decision in *Oestereich* v. *Selective Service Local Board No. 11.*

The reasons for granting the writ to review this question are identical to the reasons set forth at pp. 5-8 of the petition for certiorari in *Kolden* v. *Selective Service*, No. 1175, this Term. Petitioner respectfully refers the Court to that material.

2. Certiorari should be granted to determine whether Section 10(b)(3) precludes judicial review where it is claimed that a statute or administrative regulations are unconstitutional on their face or as applied.

The reasons for granting the writ to review this question are identical to the reasons set forth at pp. 13-15 of the petition for certiorari in *Breen* v. *Selective Service*, No. 1144, this Term. Petitioner respectfully refers the Court to that material.

3. Certiorari should be granted to settle the important question whether petitioner's declaration of delinquency, punitive reclassification, and order to report for induction, is authorized by statute or regulation.

The reasons for granting the writ to review this question are identical to the reasons set forth at pp. 9-10 of the petition for certiorari in *Kolden* v. *Selective Service*, No. 1175, this Term. Petitioner respectfully refers the Court to that material.

4. Certiorari should be granted to decide whether the punitive reclassification of petitioner violates the due process clause of the Fifth Amendment and the Sixth Amendment.

5. Certiorari should be granted to decide whether Reg. 1642.4, upon which petitioner's delinquency, reclassification, and induction order are based, is vague and overbroad.

6. Certiorari should be granted to decide whether petitioner's surrender of his Registration Certificate was an act of speech protected by the First Amendment.

The reasons for granting the writ to review the issues in Sections 4, 5 and 6 are identical to the reasons set forth at pp. 15-17 and 21-26 of the petition for certiorari in *Breen* v. *Selective Service*, No. 1144, this Term. Petitioner respectfully refers the Court to that material.

CONCLUSION

For the reasons set forth above, the writ should be granted.

Respectfully submitted,

MELVIN L. WULF
PAUL CHEVIGNY
156 Fifth Avenue
New York, New York 10010

May 28, 1969

APPENDIX

Petition for Stay

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BROTHER HAROLD WOODS, IVAN JAY KAZEN, DAVID OSHER, MITCHEL COHEN and RICHARD BELL,

Plaintiffs,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 3, Great Neck, New York, *et al.,*

Defendants.

PAUL G. CHEVIGNY, New York, N. Y., *for plaintiff David Osher.*

Appellant David Osher having moved this court for a stay of induction pending his appeal from an order of the District Court for the Eastern District of New York,

IT IS ORDERED THAT

The order of the District Court denying the motion of appellant, David Osher, to extend, beyond January 29, 1969, the preliminary injunction enjoining his induction into the Armed Forces is AFFIRMED.

The order of induction and the mandate of this court are stayed provided that the appellant files a petition for cer-

tiorari with the Clerk of the Supreme Court of the United States within 30 days of the date of this order. Rule 41(b), Federal Rules of Appellate Procedure.

J. Edward Lumbard
Robert P. Anderson
Circuit Judges
Inzer B. Wyatt
District Judge

May 1, 1969

Preliminary Injunction

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 68 C 350

BROTHER HAROLD WOODS, IVAN JAY KAZAN, DAVID OSHER, MITCHEL COHEN and RICHARD BELL, JAMES F. HOWELL and DAVID M. TOBIS,

Plaintiffs,

—v.—

SELECTIVE SERVICE LOCAL BOARD No. 3, Great Neck, New York; SELECTIVE SERVICE LOCAL BOARD No. 59, Jamaica, New York; SELECTIVE SERVICE LOCAL BOARD No. 6, Valley Stream, New York; SELECTIVE SERVICE LOCAL BOARD No. 37, Brooklyn, New York; SELECTIVE SERVICE LOCAL BOARD No. 66, Flushing, New York; COLONEL PAUL AKST, Director, NEW YORK CITY HEADQUARTERS SELECTIVE SERVICE SYSTEM; COLONEL WILLIAM H. BOUGHTON, Director, NEW YORK STATE HEADQUARTERS SELECTIVE SERVICE SYSTEM,

Defendants.

Plaintiff David Osher having applied to this Court for an order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining the defendants, or any of them, from inducting him into the United States Army, on November

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No. [redacted] 183

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

DAVID OSHER, PETITIONER

v.

SELECTIVE SERVICE LOCAL BD. NO. 6, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENTS

ERWIN N. GRISWOLD,
Solicitor General,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

MORTON HOLLANDER,
RALPH A. FINE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1467

DAVID OSHER, PETITIONER

v.

SELECTIVE SERVICE LOCAL BD. NO. 6, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENTS

Petitioner, a graduate student at Columbia University classified II-S, turned in his draft card in protest against the Vietnam war on January 11, 1968 (Pet. 4). On March 19, 1968, he was declared delinquent for failing to have his Registration Certificate in his personal possession, as required by 32 C.F.R. 1617.1, and was reclassified from II-S to I-A the same day (*ibid.*).

On April 15, 1968, petitioner brought this pre-induction suit to overturn his I-A classification and en-

join his impending induction (Pet. 4). On November 4, 1968, the district court preliminarily enjoined petitioner's induction until ten days following the decision in *Oestereich* v. *Selective Service Local Bd. No. 11*, 393 U.S. 233, which was then pending before this Court (see Pet. 12). Subsequent to the Court's decision in that case and in *Clark* v. *Gabriel*, 393 U.S. 256, the injunction was vacated by the district court (Pet. 15). The court of appeals summarily affirmed, but stayed petitioner's induction on the condition that he file a petition for a writ of certiorari by May 31, 1969 (Pet. 9-10).

Petitioner maintains that Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. III) 460(b)(3)) should not be construed as prohibiting pre-induction judicial review in circumstances such as those involved here, and challenges his reclassification and ordered induction as punitive in nature and in violation, *inter alia*, of the First and Fifth Amendments. Accordingly, this case involves issues identical to those in *Kolden* v. *Selective Service Local Bd. No. 4*, pending on petition for a writ of certiorari, No. 1175, 1968 Term, and presents substantially the same questions as those raised in *Breen* v. *Selective Service Local Bd. No. 16*, 406 F. 2d 636 (C.A. 2), in which certiorari was granted on April 28, 1969 (No. 1144, 1968 Term). Since the Second Circuit obviously relied upon its holding in *Breen* in affirming here, and since that case is now before this Court on the merits, it would appear appropriate to

defer action on this petition until after *Breen* has been decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

MORTON HOLLANDER,
RALPH A. FINE,
Attorneys.

JUNE 1969.

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Supreme Court of the United States

October Term, 1969

No. 331

MICHAEL J. KRAUS,
Petitioner,

v.

SELECTIVE SERVICE SYSTEM LOCAL 25,
Baltimore District, Maryland; and
COLONEL JAMES L. HAYS, as Director of the
Selective Service System for the
State of Maryland; and
LT. GENERAL LEWIS B. HERSHEY,
as National Director of the
Selective Service System,
Respondent.

Petition for a Writ of Certiorari to Review a Judgment of the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

October Term, 1969

No. _ _ _ _ _

MICHAEL J. KRAUS,
Petitioner,

v.

SELECTIVE SERVICE SYSTEM LOCAL 25,
Baltimore District, Maryland; and
COLONEL JAMES L. HAYS, as Director of the
Selective Service System for the
State of Maryland; and
LT. GENERAL LEWIS B. HERSHEY,
as National Director of the
Selective Service System,
Respondent

Petition for a Writ of Certiorari to Review a Judgment of the United States Court of Appeals for the Fourth Circuit

Petitioner Michael J. Kraus prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 13, 1969

Opinions Below.

The decision of the United States District Court for the District of Maryland is unreported. It is set out in Appendix A, infra, pp. 1–15. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 408 F.2d 622 and is set out in Appendix B, infra., pp. 16–22.

Jurisdiction.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 13, 1969. On June 11, 1969, Mr. Chief Justice Warren entered an order extending until July 11, 1969, the time for filing this petition for writ of certiorari. Jurisdiction is conferred on this Court by 28 U.S. Sec. 1254(1).

Questions Presented.

Petitioner, age 32, an Assistant History Professor in the History Department of Antioch College, Yellow Springs, Ohio, married and the father of three children, was classified III-A and deferred from training and service in the Armed Forces under Section 6(h)(1) or 6(h)(2) of the Military Selective Service Act of 1967 [50 App. U.S.C. Sec. 456(h)(1) or 456(h)(2)]. Upon returning his Selective Service Notice of Classification card to the government as a statement of protest against the war in Vietnam, petitioner was declared delinquent under Selective Service Regulations, stripped of his deferment, reclassified I-A and ordered to report for induction. Under these circumstances:

1. Is pre-induction judicial review precluded by Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U.S.C. Sec. 460(b)(3)] to a registrant entitled to a presidentially authorized statutory deferment under Section 6(h)(1) or 6(h)(2) of the Military Selective Service Act of 1967 [50 App. U.S.C. Sec. 456(h)(1) or 456(h)(2)?

2. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U.S.C. Sec. 460(b)(3)] preclude judicial review of petitioner's punitive reclassification and order to report for induction prior to criminal prosecution or post induction review by way of habeas corpus?

3. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Notice of Classification card in his personal possession, violate the First Amendment, the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

4. Does Selective Service Regulation 1623.5 [32 C.F.R. 1623.5], which requires each Selective Service Registrant to have in his personal possession at all times his Notice of Classification card, both on its face and as construed and applied in this case, and Selective Service Regulation 1642.4 [32 C.F.R. Sec. 1642.4] on its face and as contrued and applied in this case, violate the First Amendment; and do the said Regulations constitute an act of authority undelegated by Congress to the Selective Service System?

Statutes and Regulations Involved.

Military Selective Service Act of 1967, Sec. 10(h)(3) [50 App. U.S.C. Sec. 460(h)(3)] is set out in the Appendix C, infra, p. 23.

Military Selective Service Act of 1967, Sec. 6(h)(1) [50 App. U.S.C. Sec. 456(h)(1)] is set out in Appendix D, infra, p. 24.

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Selective Service Regulation 1623.5 [32 C.F.R. Sec. 1623.5] is set out in Appendix G, infra., p. 32.

Selective Service Regulation 1631.7 [32 C.F.R. Sec. 1631.7] is set out in Appendix H, infra., p. 33.

Selective Service Regulation 1642.4 [32 C.F.R. 1642.4] is set out in Appendix I, infra., p. 36.

Selective Service Regulation 1642.12 [32 C.F.R. 1642.12] is set out in Appendix J, infra., p. 37.

Statement of the Case.

At the time petitioner originally registered with the Selective Service System, he was a resident of the State of

Maryland and subject to the jurisdiction of Local Board 25 of the State of Maryland. Petitioner, after completing undergraduate studies at Loyola College and doing graduate work at Cornell University in Ithica, New York, accepted in 1963 a position as an assistant history professor in the History Department of Antioch College in Yellow Springs, Ohio. Petitioner has since 1963 remained on the faculty of Antioch College in the History Department.

Petitioner is 32 years of age, married and living with his wife and three children. He was accordingly classified III-A on January 21, 1966, by the Baltimore District Selective Service System Local Board 25. On February 19, 1968, petitioner returned his Notice of Classification card, SSS Form 110, to Local Board 25 solely for the purpose of stating his objection and dissent from any manner of participation to his country's involvement in the war in Vietnam. In a letter addressed to Local Board 25 together with his Notice of Classification petitioner stated, in part:

> "Please find enclosed my Notice of Classification card, which I refuse to carry until such time as my country puts an end to its criminal war against the people of Vietnam . . ."

As a result of this action, and not withstanding that no change in petitioner's status had occurred with respect to his being married and his living with his wife and three children, petitioner was declared deliquent by Local Board 25 on March 1, 1968. A copy of his Deliquency Notice is set out in Appendix K, infra., p. 38. On the same day, petitioner was reclassified I-A and was mailed a notice of such classification by the Local Board. On May 23, 1968, petitioner was sent an Order to Report for Induction at Baltimore, Maryland, on

June 19, 1968, a copy of which is set out in Appendix L, infra., p. 39.

These actions by Local Board No. 25 were in line with a memorandum and letter dated respectively October 24 and October 26, 1967, from the Director of Selective Service. This memorandum and letter (set forth in Appendix O, infra., p. 43), addressed to all local Selective Service Boards, advised local boards, among other things, to deny deferments to any registrant who takes part in "any action that violates the Military Selective Service Act." The declaration of petitioner as a delinquent and his reclassification to I-A by the respondent Local Board was clearly in implementation of General Hershey's instructions. The letter from General Hershey directed local boards to act on the basis of information received concerning so-called "illegal" demonstrations involving registrants such as the petitioner, on the strength of which classifications were to be re-opened, the registrant classified anew, "and if evidence of violation of the Act and Regulations is established, also to declare the registrant to be a delinquent and to process him accordingly."

Petitioner responded to the Order to Report for Induction by letter of May 30, 1968, a copy of which is set out in Appendix M, infra., p. 40. Petitioner's request to have his file transferred to an Ohio board was, pursuant to Selective Service Regulations, denied by letter of June 4, 1968 from petitioner's Maryland Selective Service System Local Board. A copy of this letter is set out in Appendix N, infra, p. 42.

Subsequently, and in order to complete his teaching assignment for the semester at Antioch College, petitioner

requested and was granted an extension of his date for induction until July 8, 1968. Having completed his duties at Antioch College, petitioner, sometime during the first week of July, 1968, did travel to Baltimore for the purpose of obtaining local counsel to take action on his behalf with regard to the pending induction. On July 5, 1968, counsel notified the District Court of their intention to immediately file a complaint on behalf of petitioner. That same afternoon, it was arranged that petitioner's induction be postponed until July 12, 1968, pending a hearing and ruling on the complaint in the premises. Petitioner sought a judgment that the declaration of his delinquency and his reclassification were null and void and an injunction against his induction into the armed forces. Petitioner further sought to have declared unconstitutional the Military Selective Service Act of 1967 as applied and Selective Service Regulations 1623.5, 1642.4 and 1642.12 of Title 32 C.F.R. and made application that a Three Judge Court be convened. Respondents moved to dismiss the complaint and in opposition to the convocation of a Three Judge Court. The matter was heard before His Honor, R. Dorsey Watkins, on July 10, 1968, and induction was further postponed pending disposition by the court.

Decision was rendered on July 16, 1968, at which time the Court granted the defendants' Motion to Dismiss Petitioner's Complaint and denied petitioner's Application for Convocation of Three Judge Court. It was then arranged and later ordered that petitioner's induction be stayed pending appeal before the United States Fourth Judicial Circuit Court of Appeals.

Appeal from the decision of the District Court was duly noted and thereafter the case was argued before the United

States Court of Appeals for the Fourth Circuit on January 10, 1969. On March 13, 1969, the Court of Appeals affirmed the judgement below.

Petitioner received on April 2, 1969, a Notice to Report for Induction on April 17, 1969. On April 11, 1969, the United States Court of Appeals for the Fourth Circuit ordered that the defendants be enjoined from inducting petitioner into the armed services pending a timely application by petitioner to the Supreme Court for an additional stay of induction. On May 19, 1969, it was ordered by Mr. Chief Justice Warren that a Stay of Induction be granted petitioner pending the timely filing of a Petition For Writ Of Certiorari. On June 11, 1969, Mr. Chief Justice Warren entered an order extending until July 11, 1969, the time for filing this Petition For Writ Of Certiorari.

Reasons for Granting the Writ.[1]

Introduction.

Certiorari should be granted in this case because the consititutional and statutory questions here involved affect a great and growing number of young Americans who are subject to the rules and regulations of the Selective Service System and who must face the imposition of various penalties and burdens as a result of their expressing their opposition to this country's involvement in Vietnam, an expression protected by rights granted under the First Amendment to our Constitution.

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[1] The case of *Breen v. Selective Service Local Board No. 16*, in the Supreme Court, ~~Case No. 1144, October Term, 1968~~, in which certiorari has been granted, is on all-fours with Petitioner's case. Since the points to be considered in Petitioner's case are essentially the same as those raised in the Petition for Writ of Certiorari in *Breen*, Petitioner has borrowed substantially from the *Breen* Petition.

Consolidated, October, 1969

Pursuant to a directive from General Hershey, contained in the form of a letter together with a Local Board Memorandum[2], from General Hershey as Selective Service Director, there have been many young men who have been reclassified from an exempt or deferred classification to an I-A classification. General Hershey's directive of October, 1967, threatens war protestors, by means of reclassification into a delinquent status, with loss of their draft deferments and with immediate induction into the armed forces.

The letter and memorandum addressed to all members of the Selective Service System " . . . asserts that since 'any action' violative of the Selective Service Act, regulations, or 'related processes' is patently contrary to the national interest, registrants who commit such actions 'should be denied deferment in the national interest.' In addition, it condemns 'illegal activity which interferes with recruiting or causes refusal of (military) duty' as 'not by any stretch of the imagination' compatible with the national interest. It goes on to declare that

> 'Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

[2] Text published in the New York Times, November 9, 1967.

> A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established . . . also . . . declare the registrant to be delinquent and . . . process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

The letter concludes by urging

> all elements of the Selective Service System . . . to expedite responsive classification and the processing of delinquents to the greatest possible extent consistent with sound procedure.

Local Board Memorandum No. 85,[1] apparently attached to this letter, instructs local boards to forward any abandoned or mutilated draft card they might receive to the owner's draft board and informs the recipient board how it should go about declaring the owner delinquent.

The delinquency regulations provide in pertinent part that

> whenever a registrant has failed to perform any duty or duties required of him under the selective service law (other than certain designated duties) . . . the local board may declare him to be delinquent.

32 C.F.R. § 1642.4(a) (1968). A delinquent registrant may be classified 1-A and if he is, should be moved to the head of his group. See 32 C.F.R. §§ 1642.12, 1642.13, 1631.7 (1968).

[1] Selective Service Memorandum No. 85, dated July 21, 1967, at pp. 2 and 3.

A. Certiorari should be granted because the decision below conflicts with this Court's decision in *Oestereich v. Selective Service Local Board No. 11*, 37 U.S.L. Week 4053.

In its decision in Oestereich, this Court characterized the use of the delinquency procedure in the circumstances of that case as "basically lawless" and a "clear departure" by the Local Selective Service board from its mandate.

The Court also noted that even if the Congress had authorized local boards to revoke Selective Service exemptions through the use of delinquency procedures: "serious questions would arise if Congress were silent and did not prescribe standards to govern the boards' actions." 37 U.S.L. Week at 4054.

Oestereich stands for two propositions: First: that delinquency reclassification is unlawful if the registrant involved qualifies for a statutory exemption, and, second, that a bona-fide claim of such an unlawful reclassification is entitled to pre-induction judicial review despite the language of Section 10(b)(3). As was stated by the Court, ibid.

> "... But Congress did not define delinquency; nor did it provide any standards for its definition by the Selective Service System. Yet Selective Service, as we have noted, has promulgated regulations governing delinquency and uses them to deprive registrants of their statutory exemption, because of various activities and conduct and without any regard to the exemptions provided by law.
>
> "We can find no authorization for that use of delinquency. Even if Congress had authorized the

> Boards to revoke statutory exemptions by means of delinquency classifications, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions. There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards freewheeling agencies meting out their brand of justice in a vindictive manner.
>
> "Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. . . ."

In *Clark v. Gabriel*, 37 U.S.L. Week 3217, decided by this court on the same day as Oestereich, involving the question of whether or not a Selective Service System registrant was entitled to deferment as a conscientious objector, this honorable court stated:

> ". . . In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being 'sustained by the local board.' 50 U.S.C. App. §456(g) . . ."

The question presented herein, as to whether or not pre-induction judicial review is precluded by Section 10(b)(3), Military Selective Service Act of 1967, 50 App. U.S.C. 460(b)(3) to a registrant entitled to a presidentially authorized statutory deferment under 50 App. U.S.C. 456(h)(1) and 50 App. U.S.C. 456(h)(2) is not specifically answered by either Oestereich or Gabriel.

But see *Kimball v. Selective Service*[4] where it is stated by the Court that " . . . the distinction attempted to be drawn by the Government between an 'exemption' under 456(g) and a 'deferment' under 456(h) is one without legal significance. Both sections are provided for by Acts of Congress, both promulgate precise rules for the Selective Service Boards to follow; and neither allows for judgment or discretion by such boards in carrying out the Congressional Mandate."

The underlying issue in the case at bar is whether the same reasoning and exception to Section 10(b)(3) which this Court found in Oestereich applies to a registrant with a presidentially authroized statutory deferment rather than a statutory exemption. Clearly if it is the mandate of Congress that a registrant who maintains a home with his wife and children be exempt from the Draft, that is the law. It is equally clear that if Congress authorizes the President to defer a father maintaining a home with his wife and children and the President does in fact provide for such a deferment, that is also the law.

Petitioner's case is on all fours with the facts in Oestereich. Both involve persons in institutions of higher learning who have

[4] 283 F. Supp. 606

part in organized demonstrations in opposition to the war in Vietnam. Both cases involve an act of returning draft cards to the government. Neither involve the destruction or mutilation of a draft card. Both registrants were declared delinquent by their local boards pursuant to instructions contained in the Memorandum and letter which issued from the Director of Selective Service in October, 1967. Neither was given an opportunity for a hearing on the finding of delinquency, nor was either given the opportunity to clear up the delinquency. Both were reclassified I-A on the same day that they "became delinquent". The reason for the alleged delinquency in each instance was the failure to possess a Draft card. Both were ordered to report forthwith for induction into the armed forces.

The teaching of *Oestereich* is clear: a student who is entitled by statute to an exemption from military service is entitled to judicial review of his reclassification, without having to make the harsh and risky choice of either defying induction and inviting criminal prosecution or submitting to induction and thereafter seeking judicial relief through habeas corpus. In *Oestereich*, this Court specifically relieved the registrant of that dilemma so as not to constitute Sec. 10(b)(3) "with unnecessary harshness." *Supra*, at 40554.

The argument that Ostereich involved an exemption for divinity students, whereas petitioner's case involves a III-A deferment for a registrant with a child or children and a registrant deferred by reason of extreme hardship to dependents, and that therefore the two cases are distinguishable, is insubstantial. The deferment which is granted to a registrant with a child or children and a registrant deferred by reason of extreme

hardship to dependents under the Military Service Act of 1967 is no less mandatory than the exemption for divinity students which is set out in the same statute.

To paraphrase the language of this Court in *Oestereich*, the statutory deferment is "plain and unequivocal . . . and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type." 37 U.S.L. Week at 4054-4055.

In light of the foregoing it is not surprising that the dissenting opinion by Mr. Justice Stewart in *Oestereich*, which Justices Brennan and White joined, concedes that, to the extent that Section 10(b)(3) is no bar to judicial review in a case involving a statutory "exemption", it is equally so in the case of a statutory "deferment" which "may just as 'plainly' preclude a registrant's induction." 37 U.S.L. Week of 4058, note 9.

B. Certiorari should be granted to determine whether Section 10(b)(3) precludes judicial review where it is claimed that a statute or administrative regulations are unconstitutional on their face and as applied.

In his concurring opinion in *Oestereich*, Mr. Justice Harlan emphasized the importance of the validity of preinduction judicial review where the governing statutes and regulations are attacked as facially unconstitutional. Petitioner's posture here is identical to that of *Oestereich* for it is his claim "that the very statutes or regulations which the

board administers are facially invalid", and therefore Section 10(b)(3) which has specific reference to "classification or processing" does not apply. 37 U.S.L. Week at 4055. The case at bar does not involve what Mr. Justice Harlan correctly characterized as "the numerous discretionary, factual, and mixed law-fact determinations which a Selective Service board must make prior to issuing an order to report for induction." *Ibid.*

Thus, the courts below were not asked to review factual or discretionary decisions inherent in the "classification or processing" of a registrant, which the statute is intended to prevent. Rather, they were asked to determine the constitutionality of an administrative procedure which was actually "beyond the competence of the Selective Service Boards to hear and determine". 37 U.S.L. Week at 4056. It is clear that the constitutionality of a federal statute is beyond the jurisdiction of administrative agencies. *Public Utilities Commission v. United States*, 355 U.S. 534, 539 (1958). This is especially true of local draft boards, given their composition.

A lower court has already applied these principles to a I-S registrant who was reclassified pursuant to another Hershey Memorandum which was incompatible with Sec. 6(h)(2). On the authority of *Oestereich* the court concluded that it was "beyond cavil that a statutory right cannot be taken away by Administrative fiat" and that the plaintiff's I-A request involved "only legal determinations by the board" which were therefore subject to judicial review. *Armendariz v. Hershey*, 37 U.S.L. Week 2462.

Any other reading of Sec. 10(b)(3), as Mr. Justice Harlan's concurring opinion in *Oestereich* makes clear, is incompatible with its constitutionality:

> "To withhold pre-induction review in this case would, thus, deprive petitioner of his liberty without the prior opportunity to present to any competent forum agency or court his substantial claim that he was ordered inducted pursuant to an unlawful procedure. Such an interpretation of §10(b)(3) would raise serious constitutional problems, and is not indicated by the statute's history, language, or purpose." 37 U.S.L. Week at 4056.

It is petitioner's contention that the action of respondents, for the reasons set forth in the following sections, were based upon regulations invalid on their face or as applied and that, therefore, Section 10(b)(3) cannot constitutionally be held to preclude pre-induction judicial review.

C. Certiorari should be granted to decide whether the punitive reclassification of petitioner violates the due process clause of the Fifth Amendment and the Sixth Amendment.

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), spells out the criteria to be used to measure whether administrative sanctions are to be denominated penal or regulatory.

> "The punitive nature of the sanction here is evident under the tests traditionally applied to

> determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . ." 372 U.S. at 168-169.

Of the *Mendoza-Martinez* criteria, at least four clearly apply here.

(1) Induction "involves an affirmative disability or restraint." This could hardly be gainsaid, in light of the well-recognized facts of military life. Indeed, the availability of *habeas corpus* to secure release from the armed forces, *Eagle v. United States ex rel. Samuels*, 329 U.S. 304 (1946), necessarily rests upon such an hypothesis.

(2) Induction premised upon delinquency "comes into play only on a finding of *scienter*." The Act makes it an offense to "knowingly" fail or neglect to perform a required duty. Sec. 12(a)(b). This Court has imposed the same criminal *mens rea* requirements upon liability for delinquency status, reclassification, and induction consequent thereon. *Bartchy v. United States*, 319 U.S. 484 (1943).

(3) Punitive reclassification followed by induction is designed to "promote the traditional aims of

punishment-retribution and deterrence." The delinquency notice (SSS Form 304) resolves any doubt on this score, for it infoms the delinquent registrant that unless he brings himself into conformity with his duties under the Act and Regualtions, he will be subject to reclassification to Class I-A or to prosecution. One is at a loss to imagine any functions other than deterrence and retribution which might be served by taking a registrant out of a classification in which he otherwise belongs like IV-D (ministerial), IV-F (unfit for service), II-S (student), or III-A (dependency) — and reclassifying him for immediate induction into the armed forces.

(4) "[T]he behavior to which [punitive reclassification and induction] applies is already a crime," under Section 12(b) of the Act.

If the Court should hold that petitioner's induction is punishment, it would then be obligated to decide whether the punishment was imposed with due process of law. We believe the Court could not but conclude that due process is entirely absent from the procedures leading to petitioner's induction.

The procedures denied include the following: counsel [Reg. 1642.1(b)]; confrontation and cross-examination [see *Harris v. Ross*, 146 F.2d 355 (5th Cir. 1944)]; compulsory process [Reg. 1642.1(b)]; privilege against self-incrimination [Regs. 1622.1(c), 1622.10, 1623.2, 1625.1]; burden of proof [Regs. 1622.1(c), 1622.10]; an impartial tribunal; public trial [Regs. Part 1624]; jury trial.

As the Court observed in *Mendoza-Martinez*, "If the sanctions these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further." 372 U.S. at 167.[5]

D. Certiorari should be granted to decide whether the punitive use of delinquency and reclassification procedures, as in this case, is authorized by statute or regulation.

The Military Selective Service Act of 1967 declares that service in the armed forces is an obligation and privilege. Section 1(c), 50 App. U.S.C. Sec. 451(c). This view of service is also reflected in Section 6(j) of the Act which allows, if it does not encourage, exclusion from service of those convicted of offenses punishable by imprisonment for a term exceeding one year.

Nonetheless, respondents here have presumed to invoke the delinquency and reclassification procedures against petitioner because he violated Reg. 1617.1 which requires registrants to have their registration certificates in their personal possession, a requirement enforceable under the Act's penal provision, Section 12(b)(6), 50 App. U.S.C. Sec. 462(b)(6). Thus, the circumstances here are the same as in

[5] In its brief in *Oesterich*, the government conceded that

"If the essential purpose actually underlying delinquency reclassification is to punish registrants for their failure to comply with their duties under the Selective Service law and regulations, a serious constitutional question is raised, since none of the required constitutional safeguards traditionally associated with criminal punishment are provided." (p. 49)

Wolff v. Selective Service, 372 F.2d 817 (2nd Cir. 1967), where the Second Circuit held that the draft boards "exceeded their jurisdiction" when they undertook to declare registrants delinquent on the ground that they violated the Act's penal provisions. 372 F.2d at 820. "[N]o regulation authorizes a draft board to declare a registrant a delinquent or to reclassify him for such action." *Id.* at 821.

As *Wolff* points out, however, jurisdiction of some offenses under Section 12 is shared by the District Courts and the local boards. The decision refers explicitly to that portion of Section 12(a) which makes it a crime for any person knowingly to "fail or neglect or refuse to perform any duty required of him under or in execution of this title." Thus, as the Second Circuit said, "a parallel clause of the regulations provides that if a registrant fails to produce certain requested information or to appear for questioning, he may under 32 C.F.R. §1642.4(a) be declared a delinquent and classified or reclassified 1-A." 372 F.2d at 821.

The question here, therefore, is whether the possession requirement of Reg. 1617.1 is the kind of "duty" which, if not performed, can be the basis for delinquency and reclassification. We believe it is not.

The principal responsibility of local boards is to select young men for induction into the armed forces. "Classification is the key to selection." Reg. 1622.1(b), and the key to classification is "pertinent" information. Reg. 1622.1(b). The regulations empower the boards to secure this information in a wide variety of ways. See Regs. 1621.14, 1622.1(b), 1625.1(c), 1641.

being the key to classification, the local board must have some device by which to secure that information from uninformative registrants. That device is the delinquency procedure. Regs. Part 1642.

[illegible] properly viewed, is analogous to civil [illegible]. It is designed not to punish for past acts, but to [illegible] with the procedures of the system leading [illegible]. Delinquency status says to the registrant [illegible] counsels into compliance with the rules [illegible] your local board to ensure that you are [illegible] you will be treated as having waived all [illegible] the System's procedures and therefore as [illegible] immediate induction.

[illegible] regulations explicitly provide for the [illegible] delinquency. Indeed, they relax the ordinary [illegible] of classification cannot be had after an [illegible] induction thereby allowing the registrant [illegible] the requirements of Selective Service procedure [illegible] last moment. Reg. 1642.13(b). The registrant [illegible] the waiver of the Systems procedural rights [illegible] the armed forces. Up until the very last [illegible] cooperating with the procedures which [illegible] to make appropriate classification [illegible] consideration of his claim that he should [illegible] available for immediate induction. *Ibid.* The [illegible] itself requests the registrant to contact [illegible] expeditiously with an eye to clearing up [illegible].

[illegible] registrant of his Notice of Classification [illegible] with the ability of a local board to

perform its classification function. In no way is the board's consideration of the propriety of a registrant's current classification (or a classification he claims), or its ability to maintain official contact with him, impeded or affected by whether or not he happens to possess the required document.

It follows from the fact that the possession requirement is not an integral part of the relationship between a local board and its registrants, that to use reclassification as a sanction to enforce the requirement is to use it as punishment, not as mere "civil" enforcement of the rules of the classification procedure.

Acts unrelated to the classification process itself may be crimes under the Act. As such, they may well be punishable after a fair trial, before an impartial judicial tribunal, with all of the required procedureal safeguards and rights. They may not, under the Regulations, the Act, or the Constitution, be punished in summary proceedings appropriate only for "civil" enforcement of the rules of the classification process.

I. Certiorari should be granted to decide whether Reg. 1642.4, upon which petitioner's delinquency, reclassification, and induction order are based, is vague, and overbroad.

Reg. 1642.4(a) authorizes declarations of delinquency (and consequent 1-A classification and priority induction) of a registrant who "has failed to perform any duty or duties required of him under the selective service law . . . ." As construed by the government in this and other cases, the regulation can be and has been applied to punish a registrant for exercising First Amendment rights.

An examination of the regulations demonstrates that the delinquency provisions are designed to serve the discrete purpose of securing information needed for intelligent classification (see Sec. D, *supra*). Consequently, the "duties required" under Reg. 1642.4(a) are properly limited to such things, for example, as the duty to return the Classification Questionnaire within 10 days (Reg. 1621.10), the duty to correct an inadequate Questionnaire (Reg. 1621.13), and the duty to report for physical examination (Reg. 1628.16). But, as we have seen, the regulation has in fact been construed to include not only the alleged "duty" by petitioner to possess his Notice of Classification Card, but also the kind of "duty" said to have been owed by the appellants in *Wolff v. Selective Service*, *supra*. According to General Hershey, it could, and should, be construed also to include the "duty" not to violate the Act in its entirety, as well as its "related processes", and not to perform acts "under unfortunate influences of misdirected emotions . . . or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation . . ." App. O, *infra*, p. 43.

A statute or regulation which lends itself to such broad interpretation runs afoul not only of the general rule against vague statutes, see, e.g., *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. Law Rev. 67 (1960), but also the rule in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), which condemns statutes with an "overbroad sweep . . . [which] lend themselves too readily to denial of [First Amendment] rights." 380 U.S. at 486.

In *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964), this Court said: "It is a familiar and basic

principle that a governmental purpose to control or prevent activities constitutionally subject to regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." And the Court repeated the admonition set out in *NAACP v. Button*, 371 U.S. 415 (1963): "[First Amendment] freedoms are delicate and vulnerable as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." 398 U.S. at 616.

The way in which Reg. 1642.4 had been applied brings it squarely within the doctrine which forbids overbroad legislation which invades rights protected by the First Amendment. The National Director of Selective Service has actively and publicly encouraged local boards to impose the sanctions on "misguided registrants" which his interpretation of the regulation has had the effect of discouraging protected activities. [Memorandum ... Petitioner made plain that "chilling" protected expression ... is at least Reg. 1642.4 should be struck down in its entirety because [it] will only a narrow portion of the prohibitions [it] will not contribute materially to [its] [illegible] standard. *Id.* at 491.

I. Certiorari should be granted to decide whether petitioner's surrender of his Notice of Classification was an act of speech protected by the First Amendment.

Petitioner alleged in his pleadings below, and has consistently maintained that the struggle in the Selective Service Notice of Classification card in order to express his Vietnam war was symbolic act of speech protected by the

public issue. As such, it was within the protection of the First Amendment guarantee of free speech. Since neither the destruction nor mutilation of the Certificate is involved, the facts of this case are distinguishable from those in *United States v. O'Brien*, 391 U.S. 367 (1968).

A consistent line of First Amendment cases has established the doctrine that symbolic action may often be protected speech under the First Amendment. Thus, "freedom of speech" has been held applicable to a whole gamut of cases, running from the display of a red flag in *Stromberg v. California*, 283 U.S. 359 (1931), to refusal to salute the American flag in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), to picketing by labor unions in *Thornhill v. Alabama*, 319 U.S. 88 (1940), to wearing black armbands in school to protest against the war in Vietnam in *Tinker, et al. v. Des Moines Independent Community School District*, 37 U.S.L.W. 4121.

Symbolic conduct such as the turning over of a draft card to a clergyman should be considered speech or expression within the protection of the First Amendment because it is peaceful in its content and directly relevant to the issue giving rise to the protest. Thus, in *Tinker*, the Court emphasized that petitioners were being punished for a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" on their part. 37 U.S.L. Week at 4122. Obviously not all speech and expression is protected under the Constitution, particularly where "nonspeech" elements are involved. See *United States v. O'Brien, supra*. The courts have confronted for more than a century the need for balancing the necessity for an ordered society against the equally vital constitutional requirement that the freedoms of speech and

assembly must be protected for that society to be democratic. This "delicate balance" has perennially required resort to such criteria as reasonableness, relevancy, and peacefulness, in weighing whether or not the action in question is constitutionally protected. But only the most "compelling" and "paramount" considerations have been held to justify infringement upon First Amendment freedoms where their exercise is *both* peaceful *and* relevant, as was surely the case with petitioner's action in turning over his draft card to a clergyman. See, for example, *NAACP* v. *Button*, *supra*; *Thomas* v. *Collins*, 323 U.S. 516 (1945); and *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

This Court has repeatedly recognized that conduct which is aimed at changing government policy by appealing to the government should be protected. It is only in this way that we insure that the government will be responsive to the will of the people. In *Stromberg* v. *California*, *supra* at 369, this Court held:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Thus, this Court has repeatedly recognized the importance of First Amendment rights as they relate to the democratic process. Equal sensitivity has been demonstrated in numerous decisions to the fragility of these constitutional rights, particularly when their exercise involves issues of critical current national importance.

The Court has shown its concern not only with direct attempts to infringe upon such rights, but with all statutes, regulations, ordinances and the like which have an indirect but potentially limiting effect upon the exercise of First Amendment rights. Thus, statutory schemes which are found to impose restraints upon the freedoms of speech and assembly or which merely are found to have a "chilling effect" upon their exercise have been held to violate the Constitution. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). It is in this tradition that the Court, ever since *Thomas v. Collins, supra*, has allowed "the widest room for discussion, the narrowest room for its restriction . . ." At 530.

The danger to the "transcendent value" of freedom of expression is clearly manifest in the present case. Some of the vital questions associated with the war in Vietnam have been and continue to be the effect of the war on our defense posture, our economy, our foreign relations, and our urban problems, to mention only a few. Symbolic protests such as peaceful marches, peaceful vigils, and the peaceful transmission of draft calls either directly to Washington or through the intermediary of a clergyman have been among the most widely used methods for ventilating such issues and raising these questions before the government and the public alike.

Conclusion.

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States District Court for the District of Maryland.

ORAL OPINION OF THE COURT
R. Dorsey Watkins, Judge.

This is Civil Action No. 19675, Michael J. Kraus versus Selective Service System Local 25, et al.

Petitioner has filed this civil action asking for a declaration as to the "constitutionality of an Act of Congress on its face and as applied to" petitioner, for an interlocutory and permanent injunction to restrain the enforcement thereof, and for the convening of a three judge court.

The defense has filed a motion to dismiss and opposition to the convening of a three judge court.

The issues, while important, seem to me to permit rather clear answers. The Court, accordingly, feels that a prompt disposition, rather than an extended opinion, is in order. The facts are not in dispute.

Petitioner registered with Local Board 25, and has received various classifications: I-D, student taking military training; I-A, when he withdrew from ROTC; II-S, student pursuing graduate work satisfactorily; I-A and on January 21, 1966 III-A on proof of marriage and dependents.

On October 16, 1967, petitioner participated in a demonstration at the induction center at Cincinnati, Ohio, and, with others, turned over his registration certificate to the

Army Colonel in charge of the induction center. Although the card should have been sent to Local Board 25, there is no record in the file of its receipt. In any event, no action was taken by the Board as a consequence either of the demonstration or of the surrender of the card.

Thereafter, in the course of an FBI investigation, petitioner prepared and circulated on December 8, 1967, a letter to plaintiff's relatives in which he candidly stated that "many of you I know very well will disagree with the illegal manner in which I have chosen to oppose the war."

On February 19, 1968, petitioner wrote to Local Board 25 enclosing his classification card and stating that the registration card may already have been received from Cincinnati.

On March 1, 1968, petitioner was declared to be a delinquent and reclassified 1-A, and sent a notice of delinquency for failure to perform required acts specifically failure to have in his possession his classification card. He was told that he had the right to a personal appearance or to appeal in 30 days, and that an appeal agent was available to aid and advise him.

On May 23, 1968, petitioner was sent notice to report for induction on June 19, 1968.

On May 30, petitioner acknowledged receipt, stating that his reclassification and subsequent induction are both illegal and that he should act accordingly. With reference to that there is attached an Addendum to Petitioner's Supplemental Citations of Authority, reading as follows:

Petitioner does, however, urge that the statute does not apply where First Amendment rights are involved. In support of this position, Petitioner relies primarily upon Wolff, 272 F. (2d) 817, in the Second Circuit, and Oesterich, now on certiorari in the Supreme Court. Neither of these supports the Petitioner's position with respect to the validity of the restrictive statute, as I think the holding generally is that as long as an adequate remedy is provided at some stage Congress has substantially complete latitude to determine at what stage it shall be made available, and here through habeas corpus or through defense to a criminal proceeding complete safeguards, again with the possible question of res judicata, are provided petitioner, and Congress may very well have felt that rather than disrupting the induction procedure per se by any number of applicants seeking the type of relief sought here, that the thing to do was to have it done in one of the decisive ways, habeas corpus or defense to a criminal proceeding.

I say neither Wolff nor Oesterich seems to me to support the contention that if First Amendment right is alleged to be involved, that that cross cuts supersedes, suspends and displaces the law of the draft.

Wolff, if properly decided, and there, with the greatest respect to the Second Circuit, I think there is some question as to whether it was, and see, for example, the notation in 81 Harvard Law Review 685, 688, and 36 Georgetown Law Review 414, at 419, as it seems to me readily distinguishable, the Court there held that conduct, a demonstration, while possibly punishable criminally, did not constitute any violation of any specific provision of the Selective Service Act. There is no such defined in the Act or any regulations

any statement that "you shall not demonstrate," though you do find specific requirements in the regulations "you shall have in your possession the registration card; you shall have in your possession the classification card."

The distinction between undefined criminal conduct and the failure to perform a duty specifically required by regulations was recognized by the Second Circuit itself in *Shiffman v. Selective Service Board* (1 Selective Service Law Reporter 3087) where the reclassification of a student for turning in and therefore being without his classification card was held justification for reclassification to I-A; and it is interesting to note that the Solicitor General opposed the granting of certiorari on the ground that a II-A classification is not a statutory exemption, and referring to the memorandum in Oestereich, to which reference will be made in another connection, mentioned Oestereich, I think, going this way.

There, some fifty divinity students had been declared delinquent for turning in their cards and were classified delinquent and I-A. The Solicitor General upheld the general approach that ordinarily habeas corpus and criminal defense are the only available remedies, but because the Board lacked authority to revoke or to ignore statutory exemptions, as distinguished from a deferment, the Solicitor General recommended that the case be remanded to the District Court to determine whether or not the penalty [illegible] fact in controversy.

I realize that in the Kimball case (S.S.L.R. [illegible]) the court refused to distinguish between a criminal [illegible] and a regulation delinquency. I think [illegible]

provisions, and among them, by similar executive order, is the requirement that the registrant shall be in possession of the registration and classification cards, so that since the President by executive order did not have to create a III A classification it seems to me perfectly clear that he would have the right to define those who could come within it and those who could say [sic] within it, and I think he had the undoubted right to impose, as a condition of any deferment that effect provisions be met, and among those provisions being the possession of registration and classification cards.

I therefore think that Section 460(b)(3) is applicable and that it is a bar to the prosecution of the suit. That of course makes it unnecessary to consider the application for a Three Judge Court but since I have learned that at least in the opinion of several of the Circuit Judges this Court is not infallible it may perhaps be as well to deal with this second aspect of the case anyway.

Secondly, I think it the fact that no case is cited by the Petitioner in which it is held that a Three Judge Court was required or could be called in a matter involving the subject matter here. Wolff was not a Three Judge Court. Oesterreich is interesting in that initially in the District Court the Government said that the Petitioner should have asked for a Three Judge Court however the Solicitor General in his memorandum to the Supreme Court, makes no mention of that and recommends that the case be remanded to the District Court for determination by it whether the jurisdictional amount was involved so that you have the clear implication that this is not the type of case which is within the coverage of the Three Judge Court Statutory provisions not can that be changed by the contention that a substantial federal question is involved here.

The argument is that the provision requiring the maintenance of the possession of registration and classification cards is an interference with freedom of speech and that treating the turning in of cards, or the not having of cards as a violation is a violation of symbolic speech. Well, in the particular case the turning in of the card imposed no restriction upon the Petitioner's speaking, writing, doing anything which otherwise he might have done with respect to his views on the Vietnam war or any other matter on which he had views. Certainly the method of communication adopted was almost the least likely to convey a meaningful message.

The ears of the Secretary of the Selective Service Board are probably as nearly immune to effect from speeches of this sort as any ears which could be found, and the members of the Board, if they read it, would probably fall within the same category. So probably it was the least possibly effective method of speech to be symbolic to be selected, but I think the important thing is that the physical act, whatever effect that has on his status as a draftee, had no effect upon his ability to communicate through speech or through appropriate symbolic conduct his ideas with respect to the war or anything else.

If you can violate the provisions of regulations as a means of symbolic speech, [illegible] and in the University of Pennsylvania Law Review 1968 and 1969, that the whole function of the volunteer [illegible] for the purpose of protesting.

I suggested on the argument of the case [illegible] does not like the motor vehicle law [illegible] and says his method of protest which I think is almost exactly [illegible]

without and says that any prosecution arising out of that would be an infringement of the right to free speech it seems to me that such analogies are always dangerous. The one which further occurred to me is when traffic regulations were initially imposed St. Paul Street was one way northbound, and the way to remember it was – it was up at is Saint and it ends in 'power' it ain't – and Charles Street was one way southbound and shortly thereafter that was reversed and Charles Street became one way northbound and St. Paul one way southbound and the merchants on Charles Street protested heavily and offered what seemed to be very satisfactory evidence that their business was seriously impaired by their, the old latter and perhaps the elderly gentlemen would not walk up hill from St. Paul to Charles Street and therefore the amount their business among others has fallen off.

Well now could one of those merchants send in his [illegible] and say at 8:30 on the morning I am going to [illegible] St. Paul Street begins the symbolic speech [illegible] I am going to buy my car northbound and it anybody else [illegible] prevention thereof the symbolic speech [illegible] protection the regulations which exist with [illegible] in Baltimore City.

[illegible]

"Petitioner also argues that the requirement in the regulations that registrants keep their registration certificates in their possession at all times (32 CFR 1617.1) violates the First Amendment, at least as applied to registrants whose surrender of their certificates is intended as a form of political protest or 'symbolic speech.' However, the 'possession' requirement has been upheld against the First Amendment challenge by every Court of Appeals which, expressly or implicitly, has considered the question." Citing three Court of Appeals decisions.

I think the Supreme Court decision in O'Brien just about puts at rest the contention that conduct of this sort can be classed as symbolic speech. Now I fully recognize that O'Brien was a case in which there was a criminal prosecution for the destruction of the registration cards, but it seems to me to be inescapable if you destroy your draft card you can't have it with you.

In 3 Criminal Law Reporter 3099 at 3101 in O'Brien the Supreme Court said: "We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended § 12(b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct."

Well, if it does not allow destruction, which is a far more striking act, certainly the sending through the mail and therefore being without would not seem to me expressing it.

"The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses." I thought I had thought of that myself "or a tax law prohibiting the destruction of books and records."

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the Selective Service administration."

Then the Court goes on [illegible] to a long explanation of how having two certificates is an easy and painless way to deceive questions and relieve the Service of [illegible] which otherwise it would have - not that they are in the nation or [illegible] has done what he is required to do, the [illegible] system in the functioning of the Board, the destruction and mutilation increases the difficulty of detecting and tracing the [illegible] functions performed by Selective Service Certificates [illegible] beyond doubt that Congress has a legitimate and

substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability.

We think it is apparent that the continuing availability to each registrant of his Selective Service certificate substantially furthers the smooth and proper functioning of the System that Congress has established to raise armies. We think it is also apparent that the nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of ready and quickly responding to continually changing circumstances. For these reasons the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

The matter is also discussed in very substantial detail in the Shuttman case—one Selective Service Law Reporter case where the Court with respect to this says:

"We fail to see how Petitioner's right of retrieval is continuing that he says it is and it is agreed that we must regard this as a positive Congressional mandate not to consider Petitioner's [card] as [anything] that is surrendered for use to protect his speech. The Court refers to and quotes from O'Brien and distinguishes Rumsfeld and Oestereich, that in those cases it was removed from the statutorily required [Selective Service] exemptions [from the Board is taking away a limited entitlement by] new regulations.

Secondly, the case is unacceptable for a Three Judge Court because a Three Judge Court in Seattle is not convened only when the constitutionality of an act of Congress is drawn in question and in this case it is the

applicability of executive orders as distinguished from acts of Congress which are called to task.

The distinction is recognized in Oestereich. The distinction is recognized in Shiffman, though not in connection with a Three Judge Court approach.

In the supplemental memorandum some reference was made as to the validity of the Selective Service in the absence of war. It is not in the pleadings. I do not think it is properly before the Court. If it were, I would say simply that that is a political question as distinguished from a judicial one, and, further, that if you take the language in O'Brien, it seems to me that Congress has the right in times of "peace" to prepare for war. I interpolate, I have my own feelings about whether we are at war or not, and I am concerned about what the effect on prisoners captured may be in the absence of a declaration of war, but that is only one of my thousands of concerns, and has no legitmate place in this opinion.

If contrary to what I have held, this was a case in which the Court had jurisdiction, I would decline to issue an injunction on the grounds that I think that the delay is inexcusable. In this case, the Petitioner knew since March of what his ultimate fate was going to be. He secured an extension of time, and then within the extension, as I understand it, really consulted counsel who did then take the Herculean task of trying to get ready. I have no criticism whatever of counsel in either the volume of work or the kind of work that they did, and particularly in the time they had, but it seems to me that the Petitioner deliberately held things up on the theory that he could at least get a few days more by coming into Court and saying look, they are going to draft

me on the 8th and give me a chance to have a hearing. He has gotten a postponement of some days, at least.

I further feel that it is quite clear that Petitioner has failed to exhaust his administrative remedies. He has, very frankly, and perhaps commendably, stated that he did not intend his letter of May 30, 1968 to be either an application for a reclassification or an appeal.

Now, I do not purport to forecast what the outcome of an application for reclassification or an appeal would have been. I can say only that here there was a deliberate intent to bypass the ordinary administrative remedies and to try to force this Court to come in a case where, in the Court's opinion, it should not be and cannot be.

I will grant the motion to dismiss.

APPENDIX B.

Opinion of United States Court of Appeals For The Fourth Circuit.

JOHN D. BUTZNER, Jr., CIRCUIT JUDGE:

This appeal concerns the effect of §10(b)(3) of the Military Service Act of 1967 on Michael J. Kraus' action to enjoin his impending induction into the armed forces. The Act [50 U.S.C. App. §460(b)(3)(1968)] provides in part:[1]

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the president, except as a defense to a criminal prosecution instituted under section 12 of this title . . . ."

The district court held that the statute prohibited preinduction judicial review of Kraus' classification and the order for him to report for induction, and it dismissed his complaint for declaratory and injunctive relief. We affirm, but in doing so we hold only that Kraus' complaint was premature. We do not pass upon the merits of his claim.

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[1] The 1967 amendment, §9(c) of the Military Service Act of 1967, 81 Stat. 104, codified prior case law. E.G., *Witmer v. United States*, 348 U.S. 375 (1955); *Estep v. United States*, 327 U.S. 114 (1946); and *Falbo v. United States*, 320 U.S. 549 (1944). But see *Wolff v. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967), which allowed pre-induction review of delinquency reclassification. "Section 10(b)(3) was likely precipitated by [Wolff]." *Oestereich v. Selective Service Bd. No. 11*, 37 U.S.L.W. 4053, 4056 n.7 (Dec. 16 1968) (concurring opinion of Mr. Justice Harlan). The 1967 amendment was designed to reemphasize that "judicial review of classification should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction." S. Rep. No. 209, 90th Cong., 1st Sess., 10 (1967), quoted in *Oestereich v. Selective Service Bd. No. 11*, No. 11, 37 U.S.L.W. 4053, 4057 (Dec. 16, 1968) (dissenting opinion of Mr. Justice Stewart).

These may be asserted after induction by habeas corpus, or if he refuses induction, by his defense to criminal prosecution.

Kraus is thirty-one years of age. He had a III-A dependency deferment as a father living with his wife and children. To protest United States action in Vietnam he returned his registration certificate and classification card to the government. His local board declared him a delinquent on the ground that he failed to have his classification card in his possession and reclassified him I-A. When ordered to report for induction, he responded by bringing this action, alleging that his reclassification was punitive, and that it violated the First and Fifth Amendments of the Constitution. He also attacked the constitutionality of § 10(b)(3) and the statutes and regulations under which the board acted.

The Supreme Court construed § 10(b)(3) in *Oestereich v. Selective Service Bd. No. 11*, 37 U.S.L.W. 4053 (Dec. 16, 1968), and *Clark v. Gabriel*, 37 U.S.L.W. 3217 (Dec. 16, 1968).[2] These cases do not deal expressly with Kraus's situation, but they chart the course we believe must be followed. Gabriel sought to enjoin his induction and to obtain a declaration that the rejection of his claim to conscientious objector classification was improper. The Court observed that the board had statutory authority to take the action which Gabriel challenged, and that the classification involved a

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[2]The Supreme Court also denied applications for stays in *Shiffman v. Selective Service Bd. No. 5*, 391 U.S. 930 (1968), and *Zigmond v. Selective Service Bd. No. 16*, 391 U.S. 930 (1968). In both cases the registrants were declared delinquents and lower courts applied § 10(b)(3) to deny preinduction review. See also *Boyd v. Clark*, 287 F.Supp. 561 (S.D. N.Y. 1968), *aff'd per curiam*, 37 U.S.L.W. 3246 (Jan. 13, 1969), which held that § 10(b)(3) barred a pre-induction challenge to the constitutionality of student deferments.

determination of fact and exercise of the board's judgment. The Court held §10(b)(3) to be constitutional and that it barred Gabriel's premature application for relief, saying:

> "We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee, be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction." 37 U.S.L.W. at 3217.

Oestereich, as a gesture of protest, returned his registration certificate to the government. The board declared him delinquent for failure to have the certificate in his possession, classified him I-A, and ordered his induction. The significant factual difference that distinguishes *Oestereich* from the case before us is this: Oesterich was a ministerial student with a IV-D exemption. Kraus, as previously mentioned, had a III-A dependency deferment. In *Oestereich* the Court held that §6(g) of the Act [50 U.S.C. App. §456(g)(1968)], which provides in part that "students preparing for the ministry . . . shall be exempt from training and service . . .," created a statutory exemption beyond reach of the board through delinquency proceedings. The Court said at 37 U.S.L.W. 4054:

> "Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. The Solicitor General

confesses error on the use by Selective Service of delinquency proceedings for that purpose.[3]

Kraus stands on a somewhat different footing than Oesterreich. Previously Kraus had been granted a student deferment. Section 6(h)(1) of the Act[4] provides that upon the termination of a student deferment, the registrant shall be liable for induction regardless of his age unless he is deferred under other exceptions specified in the Act. Among the exceptions is deferment for extreme hardship to dependents.

[3] In his memorandum submitted to the Court in April 1968 the Solicitor General stated in part:

> It is possible to construe § 6(h)(1) as applicable to the generality of situations where the local board has applied its judgment but to exclude purported action of a board which is in fact contrary to an exemption which has been expressly granted by statute. Such a construction is not only possible here but it is desirable in order to avoid conflict with the congressional determination to grant exemption to ministers and ministerial students. In this situation it may be observed that there is room for an appropriate distinction between an order which is contrary to the terms of a statute and an order which is subject to challenge only on the ground that the board has misapplied or abused its authority in making its judgment.

[4] Title 50 U.S.C. App. § 456(h)(1) (1968) states in part:

> Any person . . . who requests and is granted a student deferment . . . shall upon the termination of such a deferred status . . . be liable for induction as a registrant within the prime age group irrespective of his actual age unless he is otherwise deferred[.] As used in this subsection the term 'prime age group' means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Section 6(h)(2) of the Act[5] authorizes the President "under such rules and regulations as he may prescribe" to grant a deferment to a person who lives with his wife and children. It was under these provisions that Kraus was granted his III-A dependency deferment.

Among the rules and regulations to which Kraus' deferment was subject were those which required him to retain in his personal possession at all times his registration certificate[6] and notice of classification.[7] In a memorandum dated October 24, 1967, the Director of Selective Service recommended that local boards should declare a registrant delinquent if he fails to keep these papers in his possession[8] and to reclassify him 1-A.[9]

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[5] Title [illegible] App. 456 (h)(2) provides in part:

"[T]he President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and services in the armed forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes."

[6] Title [illegible] 1617.1 provides in part:

"Every person . . . must, after he has registered, have in his personal possession at all times his Registration Certificate . . ."

[7] Title [illegible] 1623.1 provides in part:

"Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate, a valid Notice of Classification . . ."

[8] Title [illegible] 1642.4(a) provides:

"Whenever a registrant has failed to perform any duty or duties required of him under the selective service law . . . the local board may declare him to be a delinquent."

[9] Title [illegible] 1642.12 provides in part:

"[A]ny delinquent registrant between the ages of 26 and 35 who on June 19, 1951, was, or thereafter has been or may be, deferred under any other provision of section 6 of such Act . . . may be classified in or reclassified into Class . . ."

It is apparent from the Act that Kraus did not have a statutory exemption that was placed beyond the scope of delinquency proceedings. Instead, he had an administrative deferment which was subjected by statute to rules and regulations prescribed by the President. The validity of Kraus' reclassification and order to report for induction depend upon the propriety of the administrative action taken by the board. But thus far the board has taken only intermediate steps. Not until Kraus is accepted or rejected for service will the administrative process be completed. Kraus' situation provides no compelling reason for departing from the long established principle that "Congress [is] not required to provide for judicial intervention before final acceptance of an individual for national service." *Falbo v. United States*, 320 U.S. 549, 544 (1944). For similar reasons, albeit under different circumstances, the constitutionality of §10(b)(3) was upheld in *Clark v. Gabriel*, 37 U.S.L.W. 2317 (Dec. 16, 1968).

The only exception to the defendent of judicial review recognized by the Supreme Court arises from administrative action that deprives a registrant of a statutory exemption. E.g., *Oestereich v. Selective Service Bd. No. 11*, 37 U.S.L.W. 4053 (Dec. 16, 1968). Since Kraus does not fall within this exemption, he can contest his reclassification only after completion of administrative action as prescribed by Congress in §10(b)(3). In reaching this conclusion we find support in other recent decisions that have denied pre-induction review to delinquent registrants who had classifications similar, but not identical, to Kraus' III-A dependency deferment: *Kolden v. Selective Service Bd. No. 4*, No. 19,331 (8th Cir., Jan. 28, 1969) (graduate student); *Breen v. Selective Service Bd. No. 16*, No. 32, 345 (2nd Cir., Jan. 10, 1969) (undergraduate);

Zigmond v. Selective Service Bd. No. 16, 396 F.2nd 290 (1st Cir. 1968) (former student not in the prime age group); *Carpenter v. Hendrix*, 277 F.Supp. 660 (N.D. Ga. 1967) (junior college student). *Contra*, *Armendariz v. Hershey*, 37 U.S.L.W. 2461 (W.D. Texas, Feb. 5, 1969) (graduate student); *Kimball v. Selective Service Bd. No. 15*, 283 F.Supp. 606 (S.D. N.Y., 1969) (undergraduate).

Kraus' claims are substantial. In holding that he connot assert them at this time, we do not adjudicate the merits of his complaint. Nor do we decide the government's alternative defense—Kraus' failure to exhaust his administrative appeals. Kraus' post-induction review will provide an appropriate forum for the consideration of this issue in the light of Kraus' constitutional and statutory challenge of his classification.

The judgment of the district court is affirmed.

APPENDIX C.

Military Selective Service Act of 1967, Sec. 10(b)(3)
[50 App. U.S.C. Sec. 460(b)(3)]

No judicial review shall be made of the classficiation or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

APPENDIX D.

Military Selective Service Act of 1967, Sec. 6(h)(1) [50 App. U.S.C. Sec. 456(h)(1)]

"Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship of deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date

of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term 'prime age group' means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers."

APPENDIX E.

Military Selective Serivce Act of 1967, Sec. 6(h)(2)
[50 App. U.S.C. Sec. 456(h)(2)]

(2) Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons whose employment in industry, agriculture, or other occupations or employment, or whose continued service in an Office (other than an Office described in subsection (f)) under the United States or any State, territory, or possession, or the District of Columbia, or whose activity in graduate study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest: *Provided*, That no person within any such category shall be deferred except upon the basis of his individual status: *Provided further*, That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces under the provisions of section 4(a) of this Act [section 454(a) of this Appendix] until the thirty-fifth anniversary of the date of their birth. This proviso shall not be construed to prevent the continued deferment of such persons if otherwise deferable under any other provisions of this Act. The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces (1) of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable, and (2) of any or all categories of those persons found to be physically, mentally, or morally deficient or defective. For the purpose

of determining whether or not the deferment of any person is advisable, because of his status with respect to persons dependent upon him for support, any payments of allowances which are payable by the United States to the dependents of persons serving in the Armed Forces of the United States shall be taken into consideration, but the fact that such payments of allowances are payable shall not be deemed conclusively to remove the grounds for deferment when the dependency is based upon financial considerations and shall not be deemed to remove the ground for deferment when the dependency is based upon other than financial considerations and cannot be eliminated by financial assistance to the dependents. Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. No deferment from such training and service in the Armed Forces shall be made in the case of any individual except upon the basis of the status of such individual. There shall be posted in a conspicuous place at the office of each local board a list setting forth the names and classifications of those persons who have been classified by such local board. The President may, in carrying out the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], recommend criteria for the classification of persons subject to induction under this title [said sections], and to the extent that such action is determined by the President to be consistent with the national interest, recommend that such criteria be administered uniformly throughout the United States whenever practicable, except that no local board, appeal board, or other agency of appeal

of the Selective Service System shall be required to postpone or defer any person by reason of his activity in study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors found to be necessary to the maintenance of the national health, safety, or interest solely on the basis of any test, examination, selection system, class standing, or any other means conducted, sponsored, administered, or prepared by any agency or department of the Federal Government, or any private institution, corporation, association, partnership, or individual employed by an agency or department of the Federal Government.

APPENDIX F.

§ 1622.30 Class III-A: Registrant with a Child or Children, and Registrant Deferred by Reason of Extreme Hardship to Dependents.

(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.

(b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith: *Provided*, That a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States, its Territories, or possessions.

(c) (1) The term "child" as used in this section shall include a legitimate or an illegitimate child from the date of its conception, a child legally adopted, a stepchild, a foster child; and a person who is supported in good faith by the registrant in a relationship similar to that of parent and child but shall not include any person 18 years of age or over unless he is physically or mentally handicapped.

(2) As used in this section, the term "physician" means a registrant who has received from a school, college, university, or similar institution of learning the degree of doctor of medicine or the degree of bachelor of medicine, the term "dentist" means a registrant who has likewise received the degree of doctor of dental surgery or the degrees of doctor of dental medicine, and the term "veterinarian" means a registrant who has likewise received the degree of doctor of veterinary surgery or the degree of doctor of veterinary medicine.

(3) No registrant shall be placed in Class III-A under paragraph (a) of this section because he has a child which is not yet born unless prior to the time the local board mails him an order to report for induction which is not subsequently cancelled there is filed with the local board the certificate of a licensed physician stating that the child has been conceived, the probable date of its delivery, and the evidence upon which his positive diagnosis of pregnancy is based.

(d) In the consideration of a dependency claim, any payments of allowances which are payable by the United States to the dependents of persons serving in the Armed

Forces of the United States shall be taken into consideration, but the fact that such payments of allowances are payable shall not be deemed conclusively to remove the grounds for deferment when the dependency is based upon financial considerations and shall not be deemed to remove the grounds for deferment when the dependency is based upon other than financial considerations and cannot be eliminated by financial assistance to the dependents.

APPENDIX G.

Persons Required To Have Notice of Classification (SSS Form 110) in Personal Possession.

Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form 2), a valid Notice of Classification (SSS Form 110) issued to him showing his current classification. When any such person is inducted into the armed forces or enters upon active duty in the armed forces, other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Notice of Classification (SSS Form 110) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, who shall destroy such notice.

APPENDIX H.

§1631.7 Action by Local Board Upon Receipt of Notice of Call.

(a) When a call is placed without designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction: *Provided*, That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62): *And provided further*, That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first, or (B) have a wife whom they married after the effective date (August 26, 2965) of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who have a wife whom they married on or before the effective date (August 26, 1965) of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(5) Nonvolunteers who have attained the age of 26 years in the order of their date of birth with the youngest being selected first.

(6) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

In selecting registrants in the order of their dates of birth, if two or more registrants have the same date of birth they shall, as among themselves, be selected in alphabetical order.

APPENDIX I.

32 C.F.R. Sec. 1642.4:

Declaration of delinquency status and removal therefrom.

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

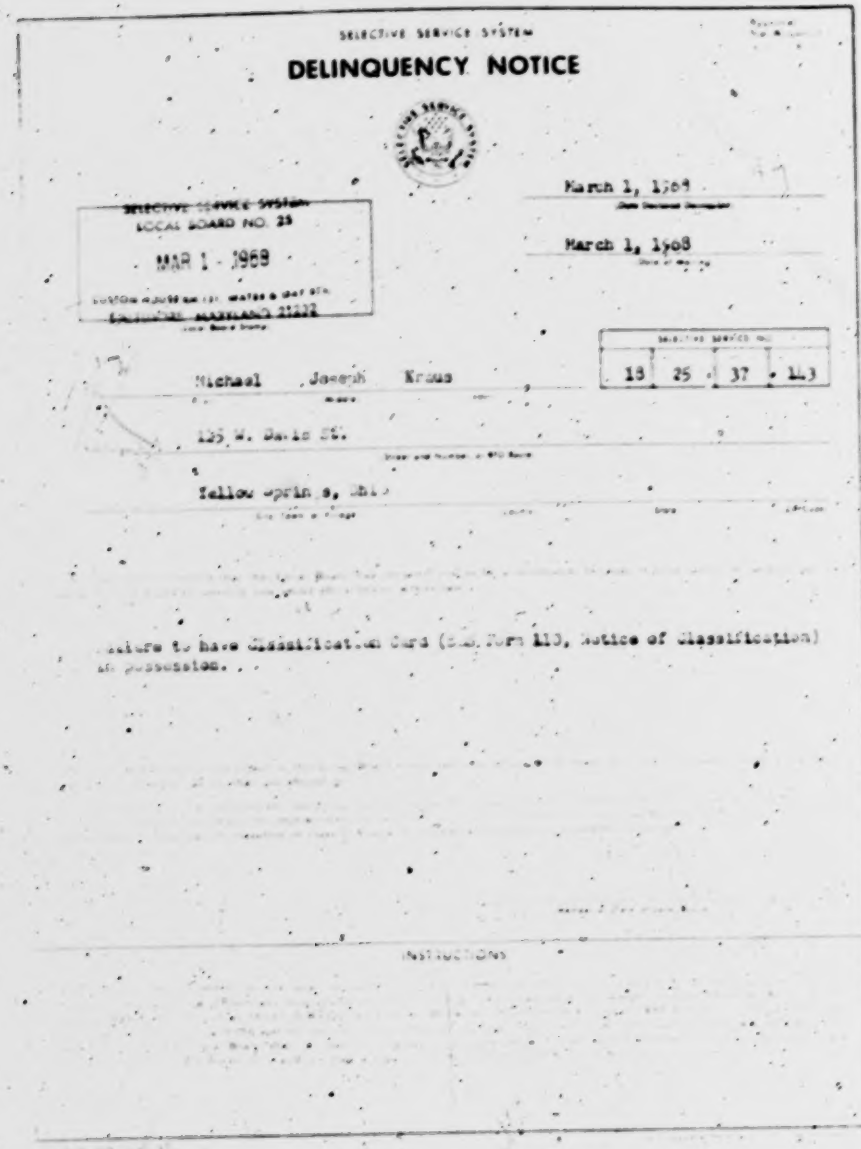
APPENDIX J.

32 C.F.R. Sec. 1642.12
Classification of Delinquent Registrant.

Any delinquent registrant between the ages of 18 years and 6 months and 26 years and any delinquent registrant between the ages of 26 and 28 who was deferred under the provisions of section 6(c)(2)(A) of the Military Selective Service Act of 1967 which were in effect prior to September 3, 1963, and any delinquent registrant between the ages of 26 and 35 who on June 19, 1951, was, or thereafter has been or may be, deferred under any other provision of section 6 of such Act, including the provisions of subsection (c)(2)(A) in effect on and after September 3, 1963, may be classified in or reclassified into Class I-A, Class I-A-O or Class I-O, whichever is applicable, regardless of other circumstances: *Provided*, That a delinquent registrant who by reason of his service in the Armed Forces is eligible for classification into Class IV-A may not be classified or reclassified into Class I-A, Class I-A-O or Class I-O under this section unless such action is specifically authorized by the Director of Selective Service.

APPENDIX K.

Delinquency Notice.



SELECTIVE SERVICE SYSTEM

DELINQUENCY NOTICE

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 25
MAR 1 - 1968
[illegible]
EMMITSBURG, MARYLAND 21727

March 1, 1968

March 1, 1968

SELECTIVE SERVICE NO.
19 25 37 143

Michael Joseph Kraus

125 W. Main St.

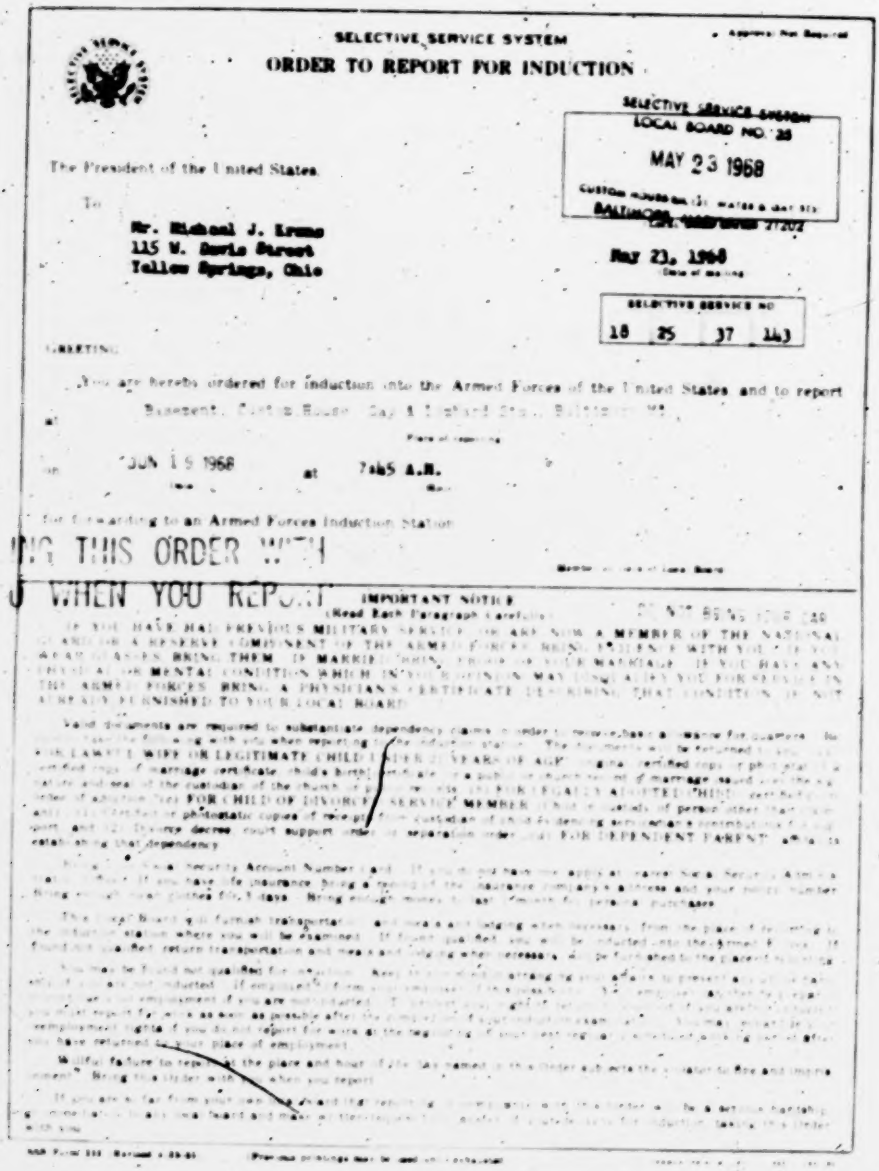
Yellow Springs, Ohio

Failure to have Classification Card (S.S. Form 110, Notice of Classification) in possession.

(Notations)

APPENDIX L.

Order to Report for Induction.



SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 28
MAY 23 1968
BALTIMORE

The President of the United States

To

Mr. Michael J. Lyons
115 W. Davis Street
Yellow Springs, Ohio

May 23, 1968

SELECTIVE SERVICE NO
18 25 37 143

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States and to report

at

for forwarding to an Armed Forces Induction Station

on JUN 19 1968 at 7:45 A.M.

NG THIS ORDER WITH
WHEN YOU REPORT

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING WITH YOU IF YOU HAVE THEM, PAPERS SHOWING THIS. IF MARRIED, BRING A MARRIAGE CERTIFICATE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH IN YOUR OPINION MAY LIMIT YOUR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims. Under no circumstances should you leave for induction without complying with this requirement. The following must be presented when reporting for induction: (1) A LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE: A certified copy of the marriage certificate. (Also a birth certificate of each child.) (2) AN ILLEGITIMATE CHILD UNDER 21 YEARS OF AGE: A certified copy of the birth certificate and one of the custodian of the church or other institution which keeps such records. (3) A STEPCHILD UNDER 21 YEARS OF AGE: A certified copy of marriage certificate showing that you married the child's parent and one of the custodian of the church or other institution which keeps such records. (4) FOR CHILD OF DIVORCED SERVICE MEMBER: A certified copy of the divorce decree, court support order or separation order and (5) FOR DEPENDENT PARENT: Affidavits or photostatic copies of receipts showing amounts contributed to dependent's support and (6) Divorce decree, court support order or separation order and (7) FOR DEPENDENT PARENT: Affidavits or photostatic copies of receipts showing amounts contributed to dependent's support and (8) Divorce decree, court support order or separation order and (9) FOR DEPENDENT PARENT: Affidavits or photostatic copies of receipts showing amounts contributed to dependent's support and (10) Divorce decree, court support order or separation order and

APPENDIX M.

Petitioner's Letter of May 30, 1968.

115 W. Davis St.
Yellow Springs, Ohio 45387
Thursday, 30 May 1968

Selective Service System
Local Board No. 25
Custom House, Rm. 131
Water and Gay Streets
Baltimore, Maryland 21202

Dear Sirs:

You have recently sent, and I have received, the following notices: (1) a Delinquency Notice, a Notice of Reclassification and an Advice of Right to Personal Appeal, all three dated 1 March, 1968; and (2) an Order to Report for Induction, dated 23 May 1968.

Please be advised of the following facts: (1) I am thirty years of age; (2) I am married; (3) I have three children; and (4) I am a teacher. On these and perhaps other grounds I am entitled by law to the classification (III-A) from which I was recently removed and reclassified I-A. My reclassification and subsequent induction are both therefore illegal, and do not bind. I shall preceed accordingly.

Please be advised also that my place of legal residence is Yellow Springs, Ohio, at the address given above. I should

therefore like my entire Selective Service System file transferred at once to the local board, at the following address:

Selective Service System
Local Board No. 47
30½ N. Detroit Street
Xenia, Ohio

Thank you very much for your attention to these pressing matters.

Very truly yours,

/S/ MICHAEL J. KRAUS

APPENDIX N

June 4, 1968

Mr. Michael J. Kraus
115 W. Davis St.
Yellow Springs, Ohio 45387

Dear Sir

In answer to your letter of May 30, 1968, please be advised that according to Selective Service Regulations, your file cannot be transferred to another Local Board.

If you will refer to your "Order to Report for Induction", last paragraph at the bottom of the form, you will find instructions for requesting transfer for Induction. When the Local Board in your area approves your request for transfer, the necessary forms for Induction will be mailed to them and you will report to the Local Board in Xenia, at their request instead of reporting to Baltimore, as originally ordered.

After you report for Induction, your papers will be returned to us and retained in your file at this Local Board.

For the Local Board
(Mrs.) Sara Steele, Secretary

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 25
JUN 4 1968
CUSTOM HOUSE-RM. 131, WATER & GAY STS.
BALTIMORE, MARYLAND 21202

APPENDIX O

[New York Times, Thursday, November 9, 1967]

Texts of Letter and Memo on the Draft

Special to The New York Times

Washington, *Nov. 8 Following is the text of a letter dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum dated Oct. 24, from General Hershey on draft cards:*

The Letter

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military or naval forces could not by any stretch

of the examination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other element of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew,

and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greatest possible extent consistent with sound procedure.

Memorandum

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification.

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 11 1969
JOHN F. DAVIS, CLERK

No. 881

In the Supreme Court of the United States

OCTOBER TERM, 1969

MICHAEL J. KRAUS, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL 25, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ERWIN N. GRISWOLD,
Solicitor General.

Office Supreme Court U.S.
AUG 18 1969
JOHN F. DAVIS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 419

Marc Belding Anderson, Marvin Atlas, Lawrence Banka, Richard J. Biesanz, James Ford, Nathan Fuchs, Thomas McGraw, Donald Russell, Peter Solenberger, Vincent Stuart, Jr., Tommie Suber, Peter Werbe, William K. Zook,

Petitioners,

vs.

General Lewis B. Hershey, National Director, Selective Service System; Col. Arthur Holmes, Director, Michigan Selective Service System; Michigan Local Boards Nos. 67, 85, 93, 95, 106, 179, 186, and 303, on their own behalf and on behalf of all other Michigan Local Boards,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SHELDON M. MEIZLISH
DAVID Y. KLEIN
1331 First National Building
Detroit, Mich. 48226
Attorneys for Petitioners

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. ____

Mary Belding Anderson, Marvin Atlas, Lawrence Banka, Richard L. Bassani, James Ford, Nathan Fuchs, Thomas McGraw, Donald Russell, Peter Schlenberger, Vincent Stuart, E. Townsend Suber, Peter Urba, William E. Zyp,

Petitioners,

vs.

General Lewis B. Hershey, National Director, Selective Service System; Col. Arthur Adams, Director, Michigan Selective Service System; Michigan local Boards Nos. 67, 68, 69, 85, 103, 172, 186, and 401, on their own behalf and on behalf of all other Michigan local Boards,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN & THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case on April 11, 1940.

Opinions Below

The decision of the Court of Appeals is unreported and is set out in the Appendix, infra, pp. 1a - 12a. The Order of Dismissal in Part of the United States District Court for the Eastern District of Michigan, Southern Division, entered June 25, 1968, is unreported and is set forth in the Appendix, infra, pp. 13a - 15a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1969. On July 10, 1969, Mr. Justice Thurgood Marshall entered an Order extending until August 11, 1969, the time for filing this Petition for Certiorari. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

Questions Presented

Petitioners were variously classified by their respective Selective Service Boards I-A, I-A, II-S, and III-A. Each of them at some time between October, 1967, and January, 1968, deliberately and for the express purpose of protesting United States foreign policy, as manifested in participation in armed hostilities in Vietnam, dispossessed himself of his selective service registration certificate and/or classification card. Each has been declared "delinquent" by his Local Selective Service Board; those holding other than I-A Classifications have been reclassified I-A subject under the Selective Service Regulations to priority induction into the armed forces of the United States. Under these circumstances:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U.S.C. §460(b)(3)] preclude judicial review of petitioners' punitive reclassifications and, in some instances, orders to report for induction?

2. Do the declarations of delinquency, punitive reclassifications and, in certain instances, orders to report for induction of petitioners for failure to have in their personal possession registration certificates and/or classification cards violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

3. Do Selective Service Regulation 1617.1 [32 C.F.R. §1617.1], as construed and applied in this case, and Selective Service Regulation 1642.4 [32 C.F.R. §1642.4], on its face, violate the First Amendment?

Statutes and Regulations Involved

Section 5(h)(1), Military Selective Service Act of 1967, 50 App. U.S.C. §456(h)(1):

> "Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person

under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection; nor shall any such person be granted a deferment under subsection, (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term 'prime age group' means the age

group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers."

Section 10(b)(3), Military Selective Service Act of 1967, 50 App. U.S.C. §460(b)(3).

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: Provided, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Selective Service Regulation 1617.1, 32 C.F.R. §1617.1:

"Effect of failure to have unaltered registration certificate in personal possession. -- Every person required to present himself for and submit to registration must, after he has registered, have in his personal possession at all times his Registration Certificate (SSS Form 2) prepared by his local board which has not been altered and on which no

notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form 2) in his personal possession shall be prima facie evidence of his failure to register. When a registrant is inducted into the armed forces or enters upon active duty in the armed forces, other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Registration Certificate (SSS Form 2) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, and such certificate shall be destroyed by the officer to whom it is surrendered."

Selective Service Regulation 1622.25, 32 C.F.R. §1622.25:

"Class II-S: Registrant Deferred Because of Activity in Study. -- (a) In Class II-S shall be placed any registrant who has requested such deferment and who is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning, such deferment to continue until such registrant completes the requirement for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever occurs first.

(b) In determining eligibility for defer-

ment in Class II-S, a student's 'academic year' shall include the 12-month period following the beginning of his course of study.

(c) A student shall be deemed to be 'satisfactorily pursuing a full-time course of instruction' when, during his academic year, he has earned, as a minimum, credits toward his degree which, when added to any credits earned during prior academic years, represent a proportion of the total number required to earn his degree at least equal to the proportion which the number of academic years completed bears to the normal number of years established by the school to obtain such degree. For example, a student pursuing a four-year course should have earned 25% of the credits required for his baccalaureate degree at the end of his first academic year, and 75% at the end of his third academic year.

(d) It shall be the registrant's duty to provide the local board each year with evidence that he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning."

Selective Service Regulation 1642.4, 32 C.F.R. §1642.4:

"Declaration of Delinquency Status and Removal Therefrom. -- (a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form 252) or the duty to comply with an Order to

Report for Civilian Work and Statement of Employer (SSS Form 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form 100) and shall complete a Delinquency Notice (SSS Form 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form 101)."

Statement of the Case

The facts herein are not in dispute and are set forth herein as described by the Court of Appeals in the majority opinion. At some time between October, 1967, and January, 1968, each of petitioners herein intentionally dispossessed himself of his selective service registration certificate and/or classification card. On October 24, 1967, General Hershey, National Director of the Selective Service System, issued "Local Board

Memorandum No. 85"[1] and, on October 26, 1967, a letter to the Local Boards from the Director of Selective Service.[2] This memorandum and letter, addressed to all Local Selective Service Boards, advised Local Boards, among other things, to reclassify as delinquents all registrants who abandoned or mutilated their registration and/or classification cards.

Each of petitioners was subsequently declared a delinquent, and those not already classified I-A were reclassified same pursuant to the delinquency regulations, 32 C.F.R. §1642. Petitioners and eleven others then brought an action in the United States District Court for the Eastern District of Michigan seeking injunctive and declaratory relief against the Selective Service System and their respective Local Boards.

In response to the Government's motion, the District Court dismissed the action as to nineteen of plaintiffs and reserved action as to five plaintiffs pending receipt of further information. The District Court's dismissal was predicated upon a holding that plaintiffs were not deprived of their constitutional rights, that the delinquency regulations were valid, and that judicial review of plaintiffs' classifications was barred by Section 10(b)(3) of the Selective Service Act [50 App. U.S.C. Sec. 460(b)(3)].[3]

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1. Local Board Memorandum No. 85 is set forth in the Appendix, infra, pp. 19a-20a.

2. Appendix, infra, pp. 16a-18a.

3. The Order of Dismissal in Part of the District Court is set forth in the Appendix, infra, pp. 13a-15a.

An appeal on behalf of thirteen of the nineteen plaintiffs affected by the District Court's Order of Dismissal in Part was timely filed with the United States Court of Appeals for the Sixth Circuit.[4] Subsequently, stays of induction were issued by that Court for two of appellants.[5] On April 11, 1969, the Order below was affirmed (Judge Combs dissenting). In essence it was the rationale of the Court that neither Oestereich v. Selective Service Local Board No. 11, 393 U.S. 233 (1968), nor Clark v. Gabriel, 393 U.S. 256 (1968), was dispositive of the issues raised in the appeal, but rather the issue for the Court to decide was whether there is a significant difference, insofar as delinquency reclassification is concerned, between a statutory exemption and a statutory deferment and, if so, does the procedure have a reasonable basis?, does it have any legislative or judicial sanction?, and is it nevertheless a penal provision so that unilateral agency action is proscribed? The Court concluded there is a significant difference between a statutory exemption and a statutory deferment -- that is, in its view, an "exempt" person is predetermined to be outside the [Selective Service] System while a "deferred" person is within the System. The Court then went on further to conclude that the procedure does have a reasonable basis with legislative sanction and is not, the majority held, a penal provision. Judge Combs in a brief dissent indicated he was of the opinion that

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4. No appeal was taken for six plaintiffs who either had not dispossessed themselves of their cards, or were not reclassified, or, in the interim, had had their classifications restored.

5. Peter Solenberger and Thomas McGraw.

the delinquency regulations are punitive and invalid for that reason.

Reasons for Granting the Writ

Certiorari should be granted in this case because it poses a number of questions not decided in Oestereich v. Selective Service Local Board No. 11, supra, the resolution of which will affect a substantial number of registrants reclassified from various classifications pursuant to Local Board Memorandum No. 85 and the Hershey letter of October 26, 1967.[6]

A. Certiorari should be granted because the decision below misinterprets this Court's decision in Oestereich v. Selective Service Local Board No. 11, 393 U.S. 233 (1968).

6. In Breen v. Selective Service Local Board No. 16, No. 65, Oct. Term, 1969, cert. granted, 37 U.S.L.W. 3410, the relevant statistics demonstrating a substantial impact of the questions upon the rights of selective service registrants were set forth in considerable detail in the Petition for Certiorari (pp. 7-8). In statistical terms, although the figures are not available, a resolution of the issues posed herein will have an even greater impact upon the rights of registrants under the Selective Service System, for Breen poses only the limited question of the effect of Section 10(b)(3) upon registrants reclassified from II-S, whereas in the instant case other regulatory deferments having their basis in the Selective Service Act are also involved.

The Court of Appeals deemed it a significant line of demarcation that an exempt person is predetermined to be outside the System, whereas, instead, a deferred person is within the System. It went on to point out that, if a person is outside the System, the performance or non-performance by him of such collateral duties as possessing his registration certificate will have only a "minimal effect" on the functioning of the System. But, it added, in the case of a deferred person, the impingement on the System of failure to perform a wide range of collateral duties such as registration, completion of classification questionnaires, notification of change of status or address, reporting for medical interview or physical examination, etc. is substantial.

This proceeds, we think, from a fundamentally untenable premise that exemptions are somehow of a more permanent character than deferments. Obviously this is not the case, for few exemptions are in fact permanent, and some certainly are of a less permanent nature than some deferments which the Court concludes are "within the System". For example, a ministerial student, Class IV-D (Oestereich), is "exempt"; a father or an occupant of an essential occupation, Class III-A, is "deferred". But the deferment so-called will continue, unless removed by the President, as long as he remains a father. Thus his obligation for service is not in fact deferred. He is in reality exempt in the same sense a ministerial student is, for there is no liability for service in either instance so long as each does not change his circumstances.

Obviously, it does not hold true in these situations that performance or non-performance of his duties under law by a registrant holding an

exemption will have any greater effect on the System than persons possessed of a deferment. A registrant may, for any of a variety of reasons, cease to be a divinity student and hence cease to be eligible for his "exemption". It would seem at least as likely that this could happen should a person in an essential occupation deferment classification II-A leave that occupation. Even less likely is it that a father will cease to be such. And what of persons classified I-Y by reason of physical, mental, or moral circumstances deemed to make them unfit for service in other than time of national emergency?, or persons permanently "deferred" by reason of physical disqualifications, IV-F?

As the Court of Appeals pointed out, this Court in Oestereich did not articulate any difference between exemption and deferment. There is, we submit, a sound reason as to why it did not, for there is in fact no logical differentiation which can be made.

The Court of Appeals found it necessary to attempt a distinction because it is clear that the deferment granted to undergraduate students under the Selective Service Act is no less mandatory than the exemption of divinity students provided for therein. The language of Section 6(h)(1) of the Act utilizes the imperative "shall" in directing the President to provide for the deferment from training and service in the Armed Forces of persons satisfactorily performing a full-time course of instruction at a college, university, or similar institution of learning who requests such deferment. Moreover, it has provided that the deferment "shall continue" until that person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or

attains the twenty-fourth anniversary of his birth, whichever first occurs.[7]

If there is no valid basis for distinguishing between exemptions and deferments, is there, nevertheless, a reasonable, controlling distinction which can be made between so-called statutory and non-statutory deferments? The Court of Appeals in its Opinion remarked that, having concluded that the removal of statutory deferments pursuant to the delinquency regulations was not subject to pre-induction challenge, it followed, a fortiori, for I-A, I-Y, and III-A Classifications. Again, we think the distinction is not solidly grounded in logic.

Three of petitioners were classified I-Y, and one was classified III-A.[8] Section 6(h)(2) of the Act provides:

> "... the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the armed forces (1)

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7. We wish to emphasize that the 1967 Act changed the provisions of Section 6(h)(1) so as to make student deferments mandatory, whereas previously the language was discretionary, authorizing the President to provide for such deferment if he found it to be necessary to the maintenance of the national health, safety, or interest, and the implementing regulations (32 C.F.R. §1622.25) left it to the discretion of the Local Boards to provide for the deferment of individual students.

8. Classified I-Y were Marvin Atlas, James Ford, and Nathan Fuchs. Classified III-A was Marc Anderson.

> of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable, and (2) of any or all categories of those persons found to be physically, mentally, or morally deficient or defective." [50 App. U.S.C. Sec. 456(h)(2).]

Thus, Congress has authorized the President, should he see fit, to provide for the deferment of persons meeting certain stated qualifications. Upon the President exercising his authority thus defined, that exercise has the same effect as if Congress itself had directly ordered the deferment. In other words, regardless of whether the President provides for the deferment as the result of an authorization of Congress or pursuant to its mandate, the effect of the President's act is the same: persons falling within the boundaries of the deferments thus promulgated are, as a matter of law, entitled to the classifications prescribed. Applying the principle of Oestereich, it seems clear, therefore, that a registrant deferred by reason of determination of his Local Board that he satisfies the criteria indicated by Congress and effectuated by the President is entitled to judicial review of a claim of unlawful removal of his classification, without having to make the choice of either defying induction and inviting criminal prosecution or submitting to induction and thereafter seeking judicial review through habeas corpus. In Oestereich, this Court specifically relieved the registrant of that dilemma so as not to construe Section 10(b)(3) "with unnecessary harshness", Oestereich, supra, at 240.

B. Certiorari should be granted to settle the important question of whether judicial review of claims that a statute or administrative regulations are unconstitutional per se and as applied is precluded by Section 10(b)(3).

Justice Harlan, concurring in Oestereich, stated

> "The pivotal language of §10(b)(3), for present purposes, is the statute's proscription of pre-induction judicial review 'of the classification or processing of any registrant....' I take the phrase 'classification or processing' to encompass the numerous discretionary, factual, and mixed law-fact determinations which a Selective Service board must make prior to issuing an order to report for induction. I do not understand that phrase to prohibit review of a claim, such as that made here by petitioner, that the very statutes or regulations which the board administers are facially invalid." 393 U.S. at 240 (emphasis supplied).

Precisely such a claim is raised here, for it is claimed that the delinquency and reclassification procedures are without statutory authorization and, further, for reasons to be developed later, both on their face and as applied, deprive the registrant of due process of law. The Government has expressed similar doubts concerning the constitutionality of the delinquency procedures. In its brief in Oestereich, at p. 54, it states:

> "It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction, regardless of its relationship to the individual's status as exempt or deferred or whatever. Congress prescribed criminal prosecution for such violations, and also provided for exemptions and deferments for certain classes of individuals to reflect considerations of national interest apart from simply raising manpower for the Army. Termination of such status through delinquency reclassification may effectively undermine that congressional determination and thus be inconsistent with the Selective Service Act."

The Government in its brief also conceded that the discretion given to Local Boards under Selective Service Regulation 1642.4(c) to restore a registrant's prior classification presented a serious question as to whether the Regulations did not conflict with the Act. The possibility of constitutional infirmities was also recognized by the Government including the delegation of power to Local Boards "without standards for the exercise of sweeping discretion given them by the regulations," and the "absence of any specified nexus or reasonable relationship between the violation which triggers reclassification and induction, and the registrant's status vis-a-vis the Selective Service System [which] might be viewed as inconsistent with due process notions" (p. 56).

In National Student Association, Inc. v. Hershey, No. 21903, (C.A. D.C., June 6, 1969), the Court in Footnote 18 of its opinion also expressed doubts concerning the constitutionality of the delinquency regulations.

> "Since we conclude, infra, that the deferment policy of the Hershey directive is, in effect, 'basically lawless,' appellants' challenge to at least that much of the directive may also escape the bar of Section 10(b)(3) under the narrow holding of Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233 (1968). It may be, as appellants contend, that the delinquency regulations themselves -- held lawless under Oestereich when in conflict with express statutory provisions -- are likewise completely unauthorized and thus subject to challenge under the Oestereich rationale. In view of our holding that Section 10(b)(3) is not a bar in any event, we need not decide this question." (Slip opinion at 10.)

Under the rationale of Mr. Justice Harlan, Section 10(b)(3) would bar only those suits which seek review of "discretionary, factual, and mixed law-fact determinations" of a Selective Service Board, and not those which allege that "the very statutes or regulations which the board administers are facially invalid". Oestereich, supra, at 240. We do not think Justice Harlan's interpretation is inconsistent with the majority opinion because therein it is expressly stated that conduct which is in fact "basically lawless" may be challenged because "there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed

exemption is deserved." 393 U.S. at 238. Thus, pursuant to the Harlan position, Section 10(b)(3) would have no application to the instant suit which challenges the Hershey directive and the delinquency regulations on their face.

C. Certiorari should be granted to decide whether petitioners' declaration of delinquency and priority induction was punishment, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), and, if so, whether those procedures violate the due process clause of the Fifth Amendment and the provisions of the Sixth Amendment.

In the interests of brevity and conservation of space, petitioners will forego repetition of the Mendoza-Martinez argument presented at length to the Court in Cestereich and described by Mr. Justice Harlan in his concurring opinion in Cestereich as "non-frivolous". Cestereich, supra, at p. 244, n. 6. The Mendoza-Martinez argument is set forth in detail at pp. 15-17 of the Petition for Certiorari in Breen v. Selective Service Local Board No. 16, No. 65, Oct. Term, 1969, cert. granted, 37 U.S.L.W. 3410, and petitioners incorporate that material by reference here. This claim differs from Breen in one significant respect: five of petitioners were not reclassified due to the fact that at the time they surrendered their cards they were already classified I-A. When delinquency is linked to reclassification, however, a registrant at least has the opportunity, under the Selective Service System hearing and appellate procedures (Regulations 1624 through 1627), to try to persuade

administrative officers to return his initial or deferred exempt classification. However, those petitioners who were classified I-A at the time of their declaration of delinquency were deprived even of that benefit. Thus, no opportunity whatsoever exists to challenge the delinquency determination within the Selective Service System procedures.

D. Certiorari should be granted to decide whether Regulation 1642.4, upon which petitioners' delinquency, re-classification, and induction orders are based, is vague and overbroad.

E. Certiorari should be granted to settle the important question of whether petitioners' surrender of their Selective Service cards was conduct protected by the First Amendment.

The reasons for granting the writ to review Issues D and E are identical to the reasons set forth at pp. 21-26 of the Petition for Certiorari in Breen v. Selective Service Local Board No. 16, supra. Petitioners, for brevity's sake, respectfully refer the Court to that material.

Conclusion

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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Dated: August 7, 1969

OPINION

No. 18976

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARC BELDING ANDERSON, ET AL.,
Plaintiffs-Appellants,

v.

GENERAL LEWIS B. HERSHEY, NATIONAL DIRECTOR, SELECTIVE SERVICE SYSTEM, ET AL.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided April 11, 1969.

Before: PHILLIPS, COMBS, and COFFIN*, Circuit Judges.

COFFIN, Circuit Judge. At some time between October, 1967, and January, 1968, each of the appellants in this case intentionally dispossessed himself of either or both his selective service registration and/or classification cards. On October 24, 1967, General Hershey, the National Director of the Selective Service System, issued "Local Board Memorandum 85" which directed local boards to reclassify as delinquents all registrants who abandoned or mutilated their registration and/or classification cards.[1] Each of the ap

* The Honorable Frank M. Coffin, United States Circuit Judge, First Circuit, sitting by designation.

[1] Local boards were given the following advice in the Memorandum:

"Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

pellants was subsequently reclassified under the Delinquency Regulations, 32 C.F.R. § 1642.[2] Appellants then brought an action in the United States District Court for the Eastern District of Michigan seeking injunctive and declaratory relief against their respective local boards. In response to the government's motion, the district court dismissed the action as to nineteen of the appellants and reserved action as to five appellants, pending receipt of further information.[3] The district court's dismissal was based on a holding that plaintiffs were not deprived of their constitutional rights, that the Delinquency Regulations were valid, and that judicial review of appellants' classifications was barred by § 10(b)(3) of the Selective Service Act, 50 App. U.S.C. § 460(b)(3).

As with other courts we have waited for *Oestereich v Selective Service System*, 393 U.S. 233 (1968). We now have the illumination not only of *Oestereich* but also of *Clark v Gabriel*, 393 U.S. 256 (1968). But the light focuses only at the ends of our particular stage, not the entire. For *Oestereich* dealt with, and was meticulously confined to the application of the delinquency regulations to a statutory exemption, while *Gabriel* dealt with a preinduction attack based on specific allegedly improper con-

(C) At the expiration of the time for taking an appeal if no appeal has been taken and the delinquency has not been removed, except the registrant shall report for induction or for civilian work in lieu of induction [in Class I-O] at a time fixed by or in the board's discretion at a place fixed by the board or by the United States Attorney for prosecution.

[2] Originally the cases of appellants could be divided according to the following categories: 7 V-H-S undergraduate students; 1 V-A registrant unable to meet physical or mental standards for I-A; 2 A-O or I-O full-time conscientious objectors; 1 III-A registrant with children or deferred because of extreme hardship to dependents; 1 [illegible]

[3] At the time of argument in this case the district court had entered no further orders with regard to these five plaintiffs.

siderations motivating a decision to reclassify.[4] The middle ground remains for us: not the bringing to bear of specific factual judgments on a particular case, not a deprivation of a statutory exemption by the delinquency regulations, but the deprivation of statutorily defined deferments by the same regulations.

It is not only possible but plausible to construct, as appellants in effect have done, a syllogism: *Oestereich* decrees that use of the delinquency regulations to take away a Congressionally granted exemption for "activities or conduct not material to the grant or withdrawal of the exemption" is "blantontly lawless"; a deferment, particularly a student deferment, is a comparable status, also legislatively defined; it is therefore equally immune from the application of the delinquency regulations.[5] *See also Breen v. Selective Service Local Board No. 16*, No. 32345, 2d Cir., January 10, 1969, dissenting opinion of Judge Feinberg.

We decline to adopt the syllogism. We note first that the Court restricted itself to the statutory exemption problem, without giving any clear guidelines of the intermediate situation confronting us. This restraint forces us to ask the basic question: is there any significant difference, so far as delinquency reclassification is concerned, between a statutory

[4] Prior to the Supreme Court's opinion in *Clark v. Gabriel*, *supra*, there had been suggestions in some lower court opinions that § 10 (b) (3) was an unconstitutional restraint of judicial review, *Peterson v. Clark*, 285 F. Supp. 700 (N.D. Cal. 1968) or that § 10(b)(3) was inapplicable in cases involving First Amendment questions, *Wolff v. Local Board No. 16*, 372 F.2d 817 (2d Cir. 1967). *Gabriel*, while upholding the validity of § 10(b)(3), also made clear that the Congressional prohibition of pre-induction review was not absolute. It is not enough, however, to assert that one's classification was arrived at in violation of the Constitution. *See* n. 11, *infra*.

[5] We could add that pre-induction challenges of delinquency revocations of statutory deferments would meet the criteria of avoiding the review of a complex factual determination and of posing a question (the validity of regulations) beyond the competence of a Selective Service board, discussed by Mr. Justice Harlan in his concurring opinion in *Oestereich*; and that the *Oestereich* dissenters in their footnote 9 intimated that the reasoning of the majority "may just as plainly" apply to student deferments.

exemption and a statutory deferment? If there is, we ask the further questions: does the procedure have a reasonable basis? does it have any legislative or judicial sanction? is it nevertheless a penal provision, so that unilateral agency action is proscribed?

The Court in *Oesterich* did not articulate any difference between exemption and deferment. The presence of any difference is divined only from its repeated confinement of its ruling to the case of one exempt by statute. We are forced to probe the question whether there is a significant difference in the status (exemption versus statutory deferment) being altered by the delinquency regulations. We think such a difference exists. In the case of an exemption, the Congress has made the decision that qualifying persons shall be beyond the pool of manpower available for military purposes. In the case of a deferment, the Congress has tried to set priorities, to provide predictability, and to guarantee equality of treatment — but not immunity — for those within the available pool of manpower. An exempt person is predetermined to be outside the system; a deferred person is within the system. We deem this is a significant line of demarcation.

If a person is outside the system, the performance or nonperformance by him of such collateral duties as possessing his registration certificate will have only a minimal effect on the functioning of the system. Perhaps the only effect would be to increase a local board's difficulty in reclassifying him should his status change (e.g., should a clergyman withdraw from his profession) and should he not notify the board of this change or of a change of address.[5] But in the case of a deferred person, the impingement on the system of failure to perform a wide range of collateral duties — registration itself, returning a completed Classification Questionnaire, notifying a board of change of status or address, re-

[5] Even this possibility would not apply to those whose status does not depend on occupation, such as veterans or sole surviving sons or brothers where the father or other brothers and sisters were killed in action.

porting for a medical interview or physical examination, possessing a certificate providing evidence that the registrant is satisfactorily pursuing a full-time course of instruction, etc. — is substantial. Coming specifically to undergraduate (II-S) deferments, on which appellants lay greatest stress, we observe that the regulations are on the one hand designed to insure to the student both predictability and equality of treatment; on the other hand, they seek to insure sufficient information both in the files of the system and in the possession of the individual, *United States* v. *O'Brien*, 391 U.S. 367, 379 (1968), so that a continuing relationship may make feasible response to changed conditions — e.g., a change of status by the registrant or a finding by the President in accordance with section 6(h)(1) of the Selective Service Act, 50 U.S.C. App. § 456(h)(1), that the needs of the Armed Forces require a change in student deferment policies.

Were widespread failure to comply with the adjective requirements of the system to be subject only to the sanction of criminal prosecution, the effect on both the selective service system and individual violators would be unnecessarily harsh and burdensome. As to the former, the delay, the uncertainty of meeting time-limited quantitative goals,[7] the load on prosecutors and courts would vastly hobble its functioning. As to the latter, fines and jail sentences might in a large proportion of the cases be rightly deemed an excessive response. The concept of this lesser option of terminating or suspending a privilege for delinquency is not uncommon in organizations far less militarily oriented than Selective Service — e.g., clubs, unions, and educational institutions.[8]

[7] Unlike other governmental agencies, the local boards of the Selective Service System must fill established inviolate quotas. The nature of this obligation demands efficiency in operations which in turn necessitates the maximum availability of information concerning the status and location of registrants within the jurisdiction of the various local boards.

[8] As to whether or not, in the circumstances before us, the delinquency regulations can be construed as penal, we discuss below

tion.[15] This in turn lends superficial support to the
nt that the aims of delinquency reclassification in
e were retribution and deterrence. However, the ele-
nt, retribution and deterrence appear only in so far
are always present in any compliance-securing process,
e not present in the same form or with the same
in criminal proceedings.[16] Finally, as we have earlier
d, the delinquency provisions are directed toward
the satisfaction of the legitimate needs of the Selec-
ice System. We cannot say that delinquency re-
ation and induction are excessive. In short we do not
that delinquency proceedings involve that quality
ent which in our legal system necessitates the use of
proceedings.[17]

this spirit we have discussed the application of
inquency regulations to undergraduate IIS defer-
Having upheld the validity of the delinquency regu-
n that context we hold that they may be applied
the I-A-D and III-A classifications. Of course
registrants who are declared delinquent and ordered to
induction may ultimately be rejected for service
of the factors which originally led to their I-A classi-
n.

Thus, we affirm the opinion of the district court. Appellants may, of course, seek to challenge their classifications as having no basis in fact either on habeas corpus after induction, or as a defense to a criminal prosecution for refusal to submit to induction. Normally, their falure to exhaust the administrative remedies provided by 32 C.F.R. § 1642.14 would be a bar to judicial review. *See, e.g., Dunn* v. *United States*, 383 F.2d 357 (1st Cir. 1967), *cert. denied*, 390 U.S. 982 (1968); *Ashton* v. *United States*, 404 F.2d 95 (8th Cir. 1968); *Campbell* v. *United States*, 396 F.2d 1 (5th Cir. 1968); *United States* v. *Hogans*, 369 F.2d 359 (2d Cir. 1966). However, there is no indication that appellants were apprised of the existence of the administrative remedies. Therefore, we believe that fairness will be served by requiring the Selective Service System to give appellants the opportunity to utilize their administrative remedies and thereby open the possibility that the delinquency may be cured.

Affirmed.

COMBS, Circuit Judge (Dissenting). I am of the opinion that the delinquency regulations are punitive and invalid for this reason. I, therefore, respectfully dissent.

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case where dependents would become public charges. However, Congress has not seen fit to grant an exemption to persons qualifying for a III-A classification. Moreover, we note that if appellant's view were adopted, criminal prosecution and conviction would result in even greater hardship to dependents of registrants formerly classified III-A. Finally, we note that the 1967 changes in the Selective Service Act Regulations restricted the availability of III-A deferments in order to prevent "pyramiding" deferments into an exemption. 32 C.F.R. § 1622.30(a) (1967); H.R. No. 267, 90th Cong., 1st Sess., 1967 Code, Cong. & Admin. News 1308, 1324.

United States District Court
Eastern District of Michigan
Southern Division

On June 14, 1968 the court issued an order to show cause why this action shall not be dismissed. The said order to show cause set out the conclusions of the court as follows:

"1. That the actions complained of in the plaintiffs' complaint do not set forth a deprivation of their constitutional rights, inasmuch as their activities in turning in their Selective Service registration cards were not a form of protected free speech. U.S. v. O'Brien, 36 U.S.L. 4469 (May 27, 1968).

"2. That the delinquency regulations, 32 C.F.R. 1642 and 32 C.F.R. 1631.7(a)(1), are a valid exercise of the rule-making authority of the President and that the invoking of those regulations to terminate a deferment which is subject to the rules and regulations of the Selective Service System or to order the priority induction of a registrant is not a deprivation of federal constitutional rights. Mills v. U.S., 384 F.2d 943 (9th Cir. 1967), cert. denied, 36 U.S.L. 3473 (June 10, 1968).

"3. That judicial review of the classification of any registrant is prohibited by statute until the registrant has failed to re-

spond to an order to report for induction. 50 App. U.S.C. §460(b)(3). An exception to this rule arises when a registrant has been reclassified fit for induction, or has been ordered for induction, for violation of the delinquency regulations, where he asserts a right to a statutory deferment or exemption which is not qualified by or subject to the rule-making authority of the President, including the delinquency regulations. Brief of the Solicitor General, Oestereich v. Selective Service Local Board No. 11, No. 1246, cert. granted, 36 U.S.L. . 3443 (May 20, 1968); memorandum of the Solicitor General and denial of application for writ of injunction or stay, Shiffman v. Selective Service Local Board No. 5, 36 U.S.L. . 3451 (May 27, 1968); denial of application for stay, Zigmond v. Selective Service Local Board No. 16, 36 U.S.L. . 3451 (May 27, 1968)."

The court having previously received the benefit of briefs and arguments of counsel and no cause satisfactory to the court having been shown why the action should not be dismissed as to the following plaintiffs, Marc Belding Anderson, Marvin Atlas, Fred Baker, Lawrence Banka, Richard J. Biesanz, James Ford, Nathan Fuchs, Harold Jackson, Frank H. Joyce, James Lipson, Thomas McGraw, Thomas L. Nixon, Donald Russell, Peter Solenberger, Vincent Stuart, Jr., Tommie Suber, John Vanden Brink, Peter Werbe, and William K. Zook, IT IS HEREBY ORDERED as to these plaintiffs, the action be and is hereby dismissed.

It appearing to the court that further information is required concerning the plaintiffs Benjamin Ford, Ronald Halstead, James A. Mason and John McNaughton, the court will withhold its decision until the further order of the court as to the said plaintiffs Benjamin Ford, Ronald Halstead, James A. Mason and John McNaughton. IT IS HEREBY ORDERED that within fifteen days from the date hereof, these plaintiffs and the defendants shall furnish the court additional information concerning the respective service classifications of these plaintiffs.

IT IS FURTHER ORDERED that the court at this time being satisfied that the plaintiff Leland D. Sanderson has a statutory deferment of IV D as a minister of religion or divinity student, the action shall not be dismissed as to him, and the court reserves final judgment pending such pertinent information concerning the Selective Service classification status of the said Leland D. Sanderson.

Dated June 25, 1968.

Theodore Levin
United States District Judge

New York Times, Thursday, November 9, 1967

Texts of Letter and Memo on the Draft

Special to The New York Times

WASHINGTON, Nov. 8 -- Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum, dated Oct. 24, from General Hershey on draft cards

THE LETTER

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military of naval forces could not by any stretch of the imagination be construed as being

in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the regis-

trant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greater possible extent consistent with sound procedure.

MEMORANDUM

Subject Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification.

Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-C, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been

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No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1969

MARC BELDING ANDERSON, ET AL., PETITIONERS

v.

GENERAL LEWIS B. HERSHEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR RESPONDENTS

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-C, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

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MEMORANDUM FOR RESPONDENTS

Petitioners are Selective Service registrants who intentionally failed to maintain either their registration or classification cards in their personal possession (see 32 C.F.R. 1617.1, 1623.5). As a result of such violations of Selective Service regulations, they were declared to be delinquent by their local boards, pursuant to 32 C.F.R. 1642.4 (Pet. 8, 9). Those who were not already I–A were reclassified pursuant to 32 C.F.R. 1642.12[1] (*ibid.*).

[1] Petitioners held the following classifications: I–A (available for military service); II–S (undergraduate student); I–Y (physical or mental deferment); III–A (dependency deferment) (Pet. App. 2a, n. 2).

Petitioners then brought this pre-induction suit challenging the validity of their delinquency status and reclassifications on both constitutional and statutory grounds (Pet. 9). The district court dismissed their action for injunctive and declaratory relief on the ground that Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 460(b)(3)), prohibits the pre-induction judicial review of the "classification or processing" of registrants (Pet. App. 13a–15a). The court of appeals, with one judge dissenting, affirmed (Pet. App. 1a–12a). It found nothing in this Court's decisions in *Oestereich* v. *Selective Service Local Bd. No. 11*, 393 U.S. 233, and *Clark* v. *Gabriel*, 393 U.S. 256, that rendered amended Section 10(b)(3) inapplicable where deferments, as distinguished from exemptions, were involved (Pet. App. 3a–6a). It further held that the delinquency regulations, at least as applied here, were neither constitutionally infirm nor inconsistent with the statute, and, finally, rejected petitioners' contention that their reclassifications were punitive in nature (Pet. App. 7a–11a).

This case presents substantially the same questions as *Breen* v. *Selective Service Local Bd. No. 16*, No. 65, this Term, in which certiorari was granted on April 28, 1969 (394 U.S. 997). Indeed, the court below relied extensively on the Second Circuit's opinion in *Breen* (406 F. 2d 636) in reaching its result. Since this Court's holding in *Breen* is likely to be controlling here, we respectfully submit that it would be

appropriate to defer action on the instant petition until after a decision has been rendered in that case.[2]

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1969.

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[2] Petitioners appear to suggest that certiorari should be granted here, despite the pendency of *Breen* (with the cases presumably consolidated for argument), because the instant case involves a number of registrants who previously had a variety of deferments, whereas "*Breen* poses only the limited question of the effect of Section 10(b)(3) upon registrants reclassified from II-S" (Pet. 11, n. 6; see also Pet. 14–15, 19). As the court below pointed out, however, if the delinquency regulations are valid where II-S registrants are reclassified, "they may be applied *a fortiori* to I-A, I-Y, and III-A classifications" (Pet. App. 11a). Petitioners themselves concede that the pertinent statutory language is more discretionary in character with respect to these latter classifications (see Pet. 14–15). Moreover, *Gutknecht* v. *United States*, No. 71, this Term, in which certiorari was granted along with *Breen*, involves the application of the delinquency procedure to a registrant already classified I-A, a point not mentioned by petitioners (see Pet. 19–20). No clear reasons appear to exist, therefore, for giving the instant case plenary consideration along with *Breen*.

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

KOLDEN *v.* SELECTIVE SERVICE BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 70. Decided February 24, 1970*

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments are vacated and the cases are remanded to the respective United States Courts of Appeals for further consideration in light of *Breen* v. *Selective Service Board*, 396 U. S. 460.

MR. JUSTICE HARLAN would reverse the judgments in these cases and remand them on the basis of his separate opinion in *Breen* v. *Selective Service Board*, 396 U. S., at 468, and the Court's opinion in *Gutknecht* v. *United States*, 396 U. S. 295.

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*Together with No. 73, *Chaikin* v. *Selective Service Board, et al.*; No. 164, *Faulkner* v. *Laird, et al.*; No. 183, *Osher* v. *Selective Service Board, et al.*; on petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit; No. 331, *Kraus* v. *Selective Service System, et al.*, on petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit; and No. 449, *Anderson* v. *Hershey, et al.*, on petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit.